The Methodology of Private Law

or on how to make private law recover its lost character

Javier I. Habib

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 28th May 2016

European University Institute

Department of Law

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Thesis summary

This PhD proposes a method for making private law doctrine. The introduction defines private law, argues that the way in which private laws are dealing with new cases is causing them a crisis and introduces the method that jurists should follow to make private laws exit their crisis. The chapters of the dissertation illustrate an application of the method. The first step of the method is to identify a new case. Mine is the case of revoked (firm) promises. The second step is to criticize laws and decisions. Private laws imply collateral contracts, apply the reliance theory and enact special provisions to sanction the revocation of promises. These solutions may serve to tackle the injustice arising from unduly revoked promises but compromise the integrity of, respectively, contract law, the division freedom\obligations and private law in general. The third step of the method is to think of the case's best possible private law form. I ask: If promise were to be a private law concept, what should that concept be? The form for promise is that of contract, tort and unjust enrichment. The fourth step is to construe a legal proposal. Here I construe promise as another cause of obligation. The "unilateral promise", as the new concept is called, enables judges to find an exchange of rights in certain promises and conclude their irrevocability. The last step is to evaluate the construction. I neutralize the arguments against construing promise as a (voluntary) cause of obligation and suggest that my proposal is better than the possible alternatives, which are revocability and regulating revocation as a tort. In the conclusion I show that my proposal does the work of the current laws of promises but without compromising the conceptual integrity of private law. I finish suggesting other applications of the method.

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TABLE OF CONTENTS

INTRODUCTORY PART: PRIVATE LAW, ITS CURRENT CRISIS AND THE PATH TO ITS CONTINUITY

This PhD proposes a method for making private law. As my understanding of private law may no longer be considered conventional, I will dedicate the first section of this introduction to defining private law. In section two I will explain the circumstances that motivate reflection on methodology. Section three presents the method, introducing the six parts of my PhD. In the last section I justify the methodology. Why the proposed methodology and not, for example, historical jurisprudence, sociology or economy?

IP.1. PRIVATE LAW

Here I will be working with a tri-dimensional understanding of private law.[1] To introduce you to this epistemological stance, let me first give you a glimpse of a tri-dimensional interpretation.

To the trialist, almost every sensible reality is susceptible to understanding, and understanding a sensible reality involves being able to account for it in terms of an intelligible reality. Take the example of the reality you are now confronted with. It is by virtue of the intelligible reality called "scholarly paper" that you are able to first, isolate the written text from its background and second, approach it with the intention of discerning the claims and arguments that are hereby exposed. In this example, the sensible reality is the piece of paper over which the black letterforms are displayed. You could leave this piece in a stack of other pieces of paper just like it and interpret the pile as a library, or you could separate it from the rest and, to the dismay of its author, identify it as the combustible needed to set barbeque coals alight. Sensible realities are susceptible to multiple understandings, and the soundness or unsoundness of an account or interpretation depends on the relation between the sensible reality and the intelligible reality. Your friend will applaud your resourcefulness if you point to these papers to start the fire with, but burst out laughing if she sees you twisting them into cones to serve drinks in.

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[1] For a trialist theory of law see Werner Goldschmidt, *Introducción filosófica al Derecho: La teoría trialista del mundo jurídico y sus horizontes*, 6th ed., Depalma, Buenos Aires, 1987. The name "trialism" comes from Miguel Reale, "Fundamentos da concepção tridimensional do Dirito," in *Revista Brasileira de Filosofia*, São Paolo, 4, (1960), pp. 450-470.

So far we have the "real, material or sensible dimension" and the "cultural, conceptual or intelligible dimension." What about the third dimension, what is the third element of the triad?

The "ideal or formal dimension" is the perspective from which you can render a reality intelligible. We said that what makes what you are reading now intelligible is the concept of "scholarly paper," but on its own, "scholarly paper" means nothing. "Scholarly paper" acquires intelligibility, and serves as a specific interpretative tool because of concepts like "scientific journal," "scholar," "school of thought," etc. etc. You will be able to give complete sense to the examined reality only if you approach it, albeit unconsciously, with notions relatable to "scholarly paper;" in other words, with notions that form the world of academia. The ideal dimension of our present example, what makes "scholarly paper" an interpretative tool, is the idea of "Academy."[2]

As we will see in this section, private law has three dimensions too: the cultural dimension, or private law itself; the material dimension, or the relations to which it makes sense to apply the private law concepts, rules and principles; and the ideal dimension, that abstract, but well-defined form which, if you are told of, and taught to appreciate, you can find traversing both the cultural and living private law.

IP.1.1. JUSTICE: THE FORM OF PRIVATE LAW

I need to say six things about the justice of private law. Explain the circumstances in which it generally appears, how humans make it theirs, define it, elaborate a little on it, analyze it, and parse it. So let me begin:

Justice manifests itself in environments populated by comparable egoists.[3] Comparable egoists? Egoists are purposive beings; they have the capacity to imagine purposes, and bodies to execute those purposes. But not only that; they are egoists. The purposes they pursue are for the satisfaction of their own needs and interests, they never act out of love. Now, egoists are comparable when they are in a position to compete. When they have comparable creativity, physical strength, and entitlement. So, for example, Argentina, the nation-state, and Jorge Soros, the American billionaire, can be deemed comparable egoists. Transnationally, they treat each other as actors acting each in his or its own

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[2] Academia, according to one conception of it, is "an institution devoted to caring for the intellectual inheritance—the stock of ideas, images, beliefs, skills and modes of thinking—that compose the world's civilization." Ernest Weinrib, *Corrective Justice*, Oxford University Press, Oxford, 2012, p. 297.

[3] This paragraph is inspired by a section ("The emergence of a legal order") in Roberto Mangabeira Unger, *Law in Modern Society: Toward a Criticism of Social Theory*, The Free Press, New York, 1977, p. 66 and ss.

interest. And, even though one is a state and the other a private person, they are in a position to compete: Argentina could need something from Soros that it cannot take against his will, while an act of Jorge's could shake Argentina's stability.

The occasion for justice is the encounter, willed or forced by the circumstances, of two comparable egoists. They say to each other, "I know that our interests differ. But we know that if each of us pursues her interests without consideration of the other, the other will have difficulty doing what she wants. So, why don't we establish rules between us so we can act freely without bothering each other?" Given the latent possibility of conflict, the absence of coordination and/or sought benefits of cooperation, these individuals decide to enter a juridical state of affairs. They relinquish part of their factual potential power to acquire a normative potential power or right, by which one can do whatever one desires in so far as one's deed does not impede the other's exercise of her own right. [4]

Justice in private law, put succinctly, is the rule of equal freedom. Each comparable egoist must recognize in the other an equal share of freedom.

True, the rule of equal freedom is very abstract. But the parties of the original transaction fulfill it or render it applicable. "Respect the integrity of my body if you want me to respect yours." "Accept that I take things as mine, and I will do the same for you." "Let me make you offers, I will tolerate yours;" and so on. These are real-life interests regulated in conformity with justice, norms which parties make on the basis of their indigenous beliefs and interests or, as commonly happens, import from elsewhere, like a book of private law. Yet there is something very important in the formality or purity of justice. Where private life has been comprehensively ordered, if someone refuses to accept the status quo, she can appeal to her right to equal freedom. She can, referring to the original transaction, say,

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[4] The original transaction is not hypothetical, as is the case for Rousseau's social contract. It is implicit in every private law transaction. Whenever two individuals meet to conclude a contract, they are recognizing each other as capable of assuming liability and as owners of certain transferable things. Why? Well, because the concept of contract presupposes or necessitates those notions (see 4.1.3.1). For example, when Argentina sends a letter to Jorge Soros, asking him if he will loan her a sum, Argentina is saying to Soros, "You have things I want and cannot take from you against your will." And also, "You are able to engage with me contractually." In other words, I see you as someone with rights over things and a capacity to contract obligations. Argentina is recognizing Soros as something like a nineteenth century private law persona.

Even more interesting are the implications of an original transaction for third parties. It is a proven fact that private persons achieve international relevance by effectuating transactions with well-established international actors. Once again, in receiving money from a private person, Argentina is recognizing him or her as an international private law persona. From then on other international players will recognize him or her as Argentina has. The thrilling question then arises: Should other international actors impute international law obligations to private persons on the grounds that they have been dealing with bearers of such obligations? This is the question that Rebecca Schmidt and I tackle in an article in preparation.

for example, "Look, what we recognized in each other was equality of freedom, not the infinite ability to acquire things. I want to revise the latter authorization, for you have acquired so many things that I cannot acquire even the basics for myself."

To facilitate its understanding and application, philosophers have analyzed and parsed the rule of equal freedom. An analysis of the rule consists of making the rule say more without rendering it applicable. Kant teaches us two authorizations that are already involved in the rule of equal freedom. The first says: "[I]ndependence from being bound by others to more than one can in turn bind them."[5] Obviously, if I am free to the extent that you are, I couldn't consistently say to you: "See those things there? Well, only I will be able to make them mine. You will only be bound to respect my acquisitions." The second says: All are "authorized to do to others anything that does not in itself diminish what is theirs."[6] This authorization is a bit more distant than the previous one, yet it follows analytically from the right of equal freedom: if we have established the principle of justice to secure a space for ourselves, it was not to isolate us, one from the other, but to permit pacific interaction. And interaction presupposes, as Kant says, "such things as merely communicating our thoughts to others, telling or promising them something."[7]

What about partition? The division of justice consists of saying what a putative application of justice must have, in order for it not to be dismissed without discussion. Stammler gives an example of partition when he talks about "the fundamental legal concepts."[8] I would say that three are the parts into which the rule of equal freedom must be divided: First, there is the idea of a bearer of freedom, an entity with the intelligence and strength to realize its purposes. Second, there is the idea of object. This is everything that is devoid of freedom, and can be put into service for someone's purpose. (You are not an object, for if I do what I want with you without your authorization, I hinder your freedom). Third, there is freedom properly understood. The idea of the possibility of doing this or that, as we wish, while others respect our doing so—we imagine freedom as the province of the will, a space where a will can act without the reproach of another will.

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[5] Immanuel Kant, "The Metaphysics of Morals," (Mary J. Gregor translation), in Mary J. Gregor (ed.), *Practical Philosophy*, Cambridge University Press, Cambridge, 1996, n. 6:237-8, pp. 393-4.

[6] Idem.

[7] Idem.

[8] Rudolf Stammler, *Tratado de Filosofía del Derecho*, Wenseslao Roces translation, Reus, Madrid, 2007, p. 395 and ss.

IP.1.2. PRIVATE LAW IS LIFE IN ACCORDANCE WITH JUSTICE

The form of private law is purely conceptual. We cannot physically touch free will, we have no immediate images of objects devoid of will, nor do we see the spaces where wills unfold themselves freely. These are purely conceptual ideas in the sense that they have no immediate correlation to the world of our senses. Yet they can, and actually are there to be related to sensible realities. Indeed, this is the office of private law—to account for reality in terms of justice. [9]

Take what the German Civil Code called "Person." This is the flesh-and-blood adult human, conceived as someone who acts according to her desires.[10] This is somebody to whom deeds, and the consequences that an impartial observer could reasonably attach to them, are linked by virtue of her choosing to do the things she did. The person can thus respond, where someone else imputes to her a deed or fact, and demand of others authorship recognition. Now take what the French Civil Code called "biens." These are the objects that are not persons, but have a natural or conventional entity.[11] Land, work tools, and water have natural or corporeal entity because they would be there, among us, even if we ignored them. Titles, credits, and servitudes have conventional entity in that, for them to exist, we needed to imagine and talk about them. A credit right would not exist if we had never made a contract, and in order to make a contract, we need to know what a credit or future performance is, and talk about it. The English translation of "biens" is "goods," but I prefer the word "things."

We have brought life to the categories of free will and objects devoid of will. What about juridical freedom? Private law describes the significance of freedom within what we call "legal relations."[12] I will present a basic legal relation in a dialog of two persons making law. This fictional dialogue implements a tool that I will use throughout this work—the

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[9] In a similar sense: "The point for private law is to trace the limits of the dominiums of the wills of the cohabiting individuals, to determine within which circles the will of an individual must be decisive for the individuals that stand in front. Private law attains it with the emanation of commands and prohibitions—imperative and prohibitive." Bernhard Windscheid, *Diritto delle pandette*, Carlo Fadda and Paolo Emilio Bensa translation, UTET, Torino, 1902, §27, p. 80.

[10] § 1 of the German Civil Code speaks of "legal capacity." The German Civil Code went further to state clearly that persons could also be "legal." Book 1, Division 1, Title 2 says "Legal persons" (as opposed to the "Natural persons" of Title 1). The concept of legal person enables us to see free will in organisms that have decision-making procedures, and agents, and resources to execute plans.

[11] "Le mot "biens" comprend donc, outre les choses matérielles, un certain nombre de biens incorporels, qui sont des droits, comme les créances, les rentes, les offices, les brevets, etc." Marcel Planiol, *Traité élémentaire de droit civil*, R. Pichon et R. Durand-Auzias, Paris, 1928-1932, n. 2171, p. 708.

[12] See various types of legal relations in Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," in *The Yale Law Journal*, Vol 23, No 1, (1913), pp. 16-59.

common-sense device. Clearly, private law is not only the law of equal freedom, but also the law of private actors. In other words, private persons are those who fulfill their equal freedom. The jurist may not work in a congress and still wish to develop private law. How to do it then? By fulfilling equal freedom as a reasonable person would. This is important to elaborate. As the jurist will not conduce a survey of what persons want the law to be in this or that case, the jurist picks what she believes it is the common sense. I advance my proposal in X sense rather than in Y because I think that the rule "everyone is entitled to do X" will actualize what you, she and he want. Or maybe I choose one of two competing alternatives and put it in a way that, even if it is not the prevailing common sense, its pros are emphasized to such a degree, and its cons are so little mentioned, that it appears to be the reasonable option. The following example is somewhat of an exaggeration, however it will support our exploration of the subsequent point.

One will say, "Sure, you are free and I am free, we can each do as we like within our equal freedom. But, in order to do as we like, we need certain objects, those things we've talked about. To start with, we need to breathe, drink, eat and sleep. Sometimes air, food, water, and space abound, and we don't need to talk about them. At other times however they are lacking, and we still need them. So, let us make a rule that allows us to appropriate those things, to make them ours through consumption; the other will not oppose." "Oh, right!" The other will answer, "But that's not the end of it." She will say, "I, like you, need to breath, eat and drink, and sleep. But, I don't want to sleep one night here, and another night there—I want a reliable place to rest. The same for my clothing: I don't want to be obliged to keep my cloak always on my body to exclude you from using it—I want to be able to leave it, and come back and find it waiting for me. So, let us make a rule by which I, like you, am allowed to take things for myself, and you, like I, will recognize and respect that act. I know that by making X thing mine, I am making it impossible for you to make it yours. In this sense, I am limiting your freedom without your assent. But, insofar as you can still develop freely, that you can still make use of the same authorization to appropriate things, you cannot say that I hinder your freedom. For, even if you cannot appropriate X1, you can still appropriate X2, which is of the same kind. So, let us accept the possibility of appropriation acts."

This fictional dialogue made a piece of private law, a set of declarations arranging a present-day exigency in just terms. I want to highlight the aspects that indicate that my proposal is a piece of private law. The first and most obvious indication is surely the words I chose to use. I spoke of "authorization," "freedom," "appropriation," and "exclusion." I could have spoken of "the capacity to acquire things and rights over things." These words, even outside of a doctoral dissertation in law, would likely predispose you to juridical

interpretation. Certain signs partake of the aesthetics of private law—the most immediate and indicative sign that what one is confronted with is a piece of private law.[13]

The second indication that my proposal is a piece of private law lies in the fact that the proposal concerns an issue in contemporary society. Hugo Grotius, a seventeenth century jurist, used the Roman law idea of *res communes omnium* to say that there are things that, owing to their infinitude or inapprehensible nature, cannot but belong to all. Since I cannot exclude you from navigating the sea or consuming air, things like the water of the sea and the air around us are not appropriable, are inapt to be owned, Grotius argued. [14] Today, this argument cannot be made. By throwing its waste into the atmosphere, an industry prevents me from breathing, factually excludes me from consuming air. It is appropriate, then, for law to tackle issues like the scarcity of water, air, land, and other basic human needs. That's why you can see my proposal as a law—it addresses a social issue people are concerned about and are debating.

Thirdly, my proposal is a piece of private law because the value it seeks to specify is the rule of equal freedom. These fictional egoists did not sit down to discuss the most efficient way of distributing and using available resources, or to remind each other of how their grandparents used to deal with scarcity; nor did one individual use her intelligence and/or force to overpower the other. They met to agree that they should have equal access to basic resources and ownership of things. The idea grounding these arrangements was the justice of private law: I got it because you got it.[15]

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[13] I take the words "law words" from Albert Kocourek, *Jural Relations*, MacMillan, Indianapolis, 1927, p. 25. See 4.3.2.4.(e)1.

[14] Hugo Grotius, *The Freedom of the Seas*, Ralph Van Deman Magoffin translation, Oxford University Press, New York, 1916, Chapter 5. See the very educative passage of Justinian, Institutes, 2.1.

[15] The private law theorist may be concerned by the many times I've used the term "need." Indeed, our fictional persons justified their authorization, saying: "I need to breath, eat and drink, and sleep". And, I admit, considerations of need ("does she need it?"), like considerations of merit ("does she deserve it?"), are meaningless in private law. If private law treats us as equals, it is because it assumes that we all share (only!) one thing—the freedom to do what we want. So it is that the questions lawyers are expected to make and answer are (if the issue is about someone who damaged something belonging to another) "did she want it?" and (if the dispute is over to whom a thing belongs) "who wanted it first?" Agreed. But, I must say that this point is post-developmental—it can be made when, and only when, we have private law.

Lawmakers can avoid the question of origins where the institution is generally accepted. For example, Kant begins his treatment of property with the question, "How to have something external as one's own[,]" implying that we actually need or want to know how to do such thing. ("The Metaphysics of Morals," *op. cit.*, n. 6:245, p. 401.) But in moments when an institution needs revision, we have to grasp it from its roots. And the soundest explanation is, to my mind, that almost every important institution of private law—property, contract, and succession—originated in private interests or needs. (See Rudolf von Jhering, *El fin en el derecho*, Spanish translation, Heliasta, Buenos Aires, 1978.) What private law does is

Finally, my proposal prescribes a general standard of conduct, which is how private law does justice to exigencies and cases. The fictional interlocutors do not come to the idea that they can become owners of things by silently recognizing each other's appropriation. They prescribe, explicitly state, a law. Not only that. The law they establish is comprehensive enough to apply to a generality of cases, and to stay valid until the parties sit down to discuss, and resolve to change the binding law. They do not say, "Well, as things stand today, I will respect your ownership over this or that object, until I change my mind." Moreover, a sophisticated private law would formulate its standards in technical modes. In my example, the general standard is laid down as a "declaration:" "I, like you, can take things for myself." I could have proposed a "norm:" "To acquire property, a person must take possession of an unowned thing with the intention of being its owner." It would have served me well to add the following "classification," "The modes of acquiring property are occupation, specification, conveyance and *mortis causa* succession." We will explore the various private law techniques in good time.[16]

As you can see, the juridical understanding of private law involves no sword ensuring law-abidingness. Yet it does serve states, international organizations, transnational societies, and in general, organizational forms endowed with enforcement modes. It gives them the tools they need to elaborate law for themselves or their subjects or, to identify and import the concept, rule or principle they need from past or coetaneous legislations. Likewise, it serves scholars who want to make law proposals or comprehensive private laws, such as principles for international contracts or a civil code. So private law is both the set of concepts, norms and principles that a code or set of decisions prescribed for the relation of two equally free beings and also the potentialities of these legal pieces: their form, matter, colors and labels, the ingredients that one can mix to make unmade private law.

IP.1.3. THE LIFE OF PRIVATE ACTORS: THE MATTER OF PRIVATE LAW

Social life is somehow independent of private law.[17] One could identify the reality referred to by the German law of persons, forget about the concept of legal personality, and

justify these needs and interests with the rule of equal freedom, explicate such justification with its idiosyncratic techniques, and present the technical construction in its characteristic language.

[16] I took the idea of a "legal technique" from Françoise Gény, "The Legislative Technique of Modern Civil Codes," (Ernest Bruncken translation), in Vv. Aa., *Science of Legal Method*, MacMillan, New York, 1921, pp. 498-557.

[17] Alan Watson on *The Evolution of Law*, Johns Hopkins University Press, Baltimore, 1985, p. 117 talks about "congruence" between law and life in society. In his view, "A legal institution is a social institution which has been given legal effectiveness and which is being regarded from the legal point of view. Without the social institution of slavery there will be (in almost all cases at least) no legal institution of slavery. In a

reinterpret reality from another point of view. You may see a person with a domicile and marriage, or Inga, a nice neighbor, lover and Christian—views that have nothing to do with private law. The facts of life are independent of private law in that they can be the starting point for other stories.

Independent though they are, the facts of life are nevertheless intimately related to private law. First of all, law, with its authoritative voice and appeal, marks the rhythm of social movement. Things have to go right, meaning in just directions. But the law is influenced by social reality as well; changes in the right or wrong directions undertaken by law are always produced outside of the law. This is best seen in cases of legal recognition, where a law takes as proper a practice or exigency that had its ambit of validity or satisfaction in an alien normative complex. The practices of making titles of credit, giving entity to organizations, the exigencies of the modern bankruptcy, of choosing the interpretation that favors a conclusion in favour of the valid formation of a contract—these and other related practices and exigencies came into existence and implementation in an environment called *lex mercatoria*.[18] Private law recognized and translated the practices and exigencies of merchants into its language in the twentieth century—an eloquent example is found in the 1942 Italian Civil and Commercial Code.[19]

Not only recognition but also legal changes in the strict sense occur outside of the law. The demand that law include third-class individuals into the private law persona was made by the religious, epistemological, environmental, political, economic, and aesthetic conditions and forces we call the French Revolution. This social phenomenon made the law change because it needed the law to achieve its aspirations. Max Weber gives another nice example of legal change in the strict sense when he talks about the "cavere" of some jurists, this is to say, the ability to formulate an atypical private interest into language capable of triggering the coercive machinery of state law. Key words, terms or formularies make the law incorporate contractual figures or forms of association that did not exist before.[20]

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society exclusively of small peasant farmers there may be law for small peasant farms but not for high-rises." *Idem*.

[18] See Francesco Galgano, *Lex mercatoria*, Il Mulino, Bologna, 2001.

[19] One has to acknowledge that this was merchant and civil law organized in accordance with the fascist idea. (See the interesting presentation by fascist lawyer Dino Grandi, *Delle Obbligazioni, dei contratti e della tutela dei diritti*, (Discorso pronunciato il 25 maggio 1940-XVIII alla Commissione delle Assemblee legislative per la Riforma dei Codici), Tipografia delle Mantellate, Roma, 1943(?). [In Library of Max Planck "Ital. 5754"].) In any case, this was a case of legal recognition of the fascist organization of life.

[20] Max Weber, *Economy and Society*, Guether Roth and Claus Wittich editors, Vol. 2, University of California Press, Berkeley and Los Angeles, 1978, p. 757 and ss.

Admittedly, social change troubles those who want to speak of law as a tradition.[21] We need to explain what it is that has always been there. We may say it is the language and the techniques in which the law stylistically arranges its matters. I agree; but I have a commitment. What permits law to vary its content without changing is its elastic language, powerful technique, and, I would add, justice—its abstract form. Justice is present in the many pieces of private law relations. For the jurists the task is to see changes and account for them so that justice remains unchanged. Let me try out a difficult case: In past private laws, women fell outside of the category of person. One could have made the argument that it is fair for women to be outside the legal scene, that they should be unsusceptible of response to contract and tort claims. The validity of that argument would not imply that the eventual recognition of women as capable persons came about because of a transformation in the justice of private law. Maybe women were not showing their equality to men, as comparable egoists.[22] It was found that they are so, or simply that what had been taken as a protection was actually more of a paternalistic hindrance. The legal character of an adult woman is an easy case today, and justice as equality has remained unchanged since Aristotle's formulation.

IP.2. THE CRISIS OF PRIVATE LAW

IP.2.1. CHANGES IN THE LIFE OF PRIVATE ACTORS THAT MADE THE LAST JUST PRIVATE LAWS CHANGE

Arguably, the last comprehensive visions of a just society were made law a long time ago. Paradigmatic examples are the Napoleonic Civil Code,[23] and the group of decisions assembled as the classical common law.[24] But the beliefs, practices and exigencies of the individuals that lived under those regimes changed considerably. I am thinking of moral liberalism, mass production and media, consumerism and so on. The states' private laws certainly coped with social changes. New laws appeared to contemplate the new practices

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[21] Martin Krygier tackles this issue in "Law as Tradition," in *Law and Philosophy*, Vol. 5, No 2, (Aug. 1986), pp. 237-262

[22] "Our ancestors saw fit that 'females, by reason of levity of disposition, shall remain in guardianship, even when they have attained their majority.'" Table V, 1 of the Law of the XII Tables (451-450 B.C.) http://www.csun.edu/~hcfll004/12tables.html (27-07-2015)

[23] Conf. James Gordley, "Myths of the French Civil Code," in *The American Journal of Comparative Law*, Vol. 42, No. 3, (Summer 1994), pp. 459-505.

[24] You can build a juridical interpretation of the common law with the works of the Toronto law school, like Peter Benson's conception of contract, and Ernest Weinrib's conception of tort and unjust enrichment. See a synthetized view in Ernest Weinrib, The Juridical Classification of The Obligations, Birks, Peter (ed.), *The Classification of the Obligations*, Oxford University Press, New York, 1997, pp. 37-55.

and exigencies. At times, the new law relieved the legal categories of inexplicable exceptions—the inclusion of the woman in the category of capable persons reinforced the thesis that a person is a purposive being. At other times, the new law produced little or no change in the private law categories—the concept of property changed little when energy was regulated as a movable thing.[25] Yet the classical categories could not always be used to contemplate the new realities. Sometimes, new legal categories were made to satisfy pressing social needs—I am thinking of the worker and the consumer.[26] At other times, new law used the classical categories to regulate the ungovernable realities. These new laws entered the private law, only to deform it.[27] The laws on promises are good examples of corrupt law.

IP.2.2. The laws on promises as examples of mistaken legal changes

Before the laws on promises, the common law of contract was about agreed-upon exchanges. One party could offer X to another party, in exchange for Y. Offers were, by definition, revocable. Until and unless the offeree agreed to give Y for X, the offeror was not obligated to give X; she could change her mind, revoke the offer…[28] Then cases of people making promises emerged.[29] Promises were different from offers in that the proponent would suggest to the addressee that she was bound to the proposal; she would not revoke it after having made it. Courts found injustice in cases where promisors revoked their promises. They granted actions on the part of promisees to demand the

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[25] The Argentinian 1871 Civil Code, like the French 1804 Civil Code, built its property law around the concept of thing. Only things susceptible to separation and possession could be objects of property, and the things susceptible to separation and possession consisted, according to the classical definition, of matter that one can touch (in the sense of tangibly grabbing). In 1969, a law reform introduced a paragraph saying, "The dispositions relative to things are applicable to the energy and the natural forces susceptible to appropriation." (Art 2311 *in fine*). Even if you cannot grab energy, (no one in my country would advise you to put your hand on the kind of energy the Civil Code is talking about), you can separate it: produce it, store it, and transport it. In this sense, then, there was little change in the law of property, even if the concept of thing changed to be no longer confined to things you can grab.

[26] True, workers' statutes took a great deal of matter from private law. But, as they were passed as special laws, they did not deform private law. In other words, private law's field of application shrank; but contract law remained untouched. A similar process occurred in jurisdictions where consumer law appeared in a statute of its own, separate from general private law.

[27] See the insightful and entertaining historical explanation of the law's structural crisis by Umberto Vincenti, *Diritto senza identità: La crisi delle categorie giuridiche tradizionali*, Laterza, Lecce, 2007.

[28] An excellent exposition of this logic appears in Maurice Wormser, "The True Conception of Unilateral Contracts," in *The Yale Law Journal*, Vol 26, No 2, (Dec. 1916), pp. 136-142.

[29] See A. W. B. Simpson, "Quackery and Contract Law: The Case of the Carbolic Smoke Ball", in *The Journal of Legal Studies*, Vol. 14, No. 2, (Jun. 1985), pp. 345-389 and the teaching decision *Alexander Brogden v Metropolitan Railway Company* (1876–77) L.R. 2 App. Cas. 666-698.

performance of promises.[30] How did they do it? They did it with contract law. They found some deed on the part of the promisee that indicated that the promisee had indeed accepted the promise before it was revoked. In order to do that, the courts had to treat a promise as an offer. A problem then emerged with real offers. Someone would make an offer—not a promise—and the judges would treat it as a promise. How? By applying the new forms of making an offer and acceptance. As a result of the decisions on promises, an offeror could be bound to an offer before it was accepted. The common law contract was no longer about agreed-upon exchanges.[31]

We see here the deformation of one of private law's most beautiful categories. C (the contract) was made to do EA (enforce agreed-upon exchanges of rights) and is used to do E~A (enforce unagreed-upon exchanges of rights). Now the category no longer does EA as it used to (because it also works for unagreed-upon exchanges of rights). Let us look at another type of corruption.

We move to the French Civil Code. This private law used to clearly separate the illicit from the licit sources of obligation.[32] On the one hand, there were cases where a person, by malice or imprudence, invaded another person's sphere of right, damaging an object of that person's right.[33] On the other hand, there were cases where two persons, on the basis of an agreement, decided to exchange services or things.[34] In between these two areas lay

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[30] See *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256, *Daulia Ltd v Four Millbank Nominees Ltd* (Goff LJ), [1978] 2 ALL ER, p. 559 and ss, and *Barry v Davies* (t/a Heathcote Ball & Co) [2000] 1 W.L.R. 1962-1969 (CA (Civ Div)) I discuss *Barry v Davies* in 2.2.

[31] See, for example, Goff LJ *obiter dicta* in *Daulia, cit*, p. 561: "once the offeree has embarked on performance it is too late for the offeror to revoke his offer." And section 45 of Restatement [Second] of Contracts in http://www.lexinter.net/LOTWVers4/restatement_(second)_of_contracts.htm (29-1-2016)

[32] The Code makes the division in its method of exposition (Book III, Title III "Of contracts or conventional obligations in general" is followed by Title IV "Of engagements which are formed without contract.") and in a specific article (see Art. 1370). The Code conforms to the classical division of justice in voluntary and involuntary transactions (Aristotle, *Nicomachean Ethics*, Terence Irwin translation., 2 ed., Hackett, Indianapolis, 1999, Book V, Chapter 2, §13, 1131a.) That the voluntary obligations are licit sources of obligation, and that the involuntary obligations are illicit sources of obligation is a relation that I take from Marcel Planiol, "Clasification des sources des obligations," in *Revue critique de legislation et de jurisprudence*, No XXIII, Paris, (1904), pp. 224-237, who suggestively treats quasi-contracts as involuntary illicit acts (p. 229).

[33] Examples are torts like assault and trespass, and the quasi-torts of Book III, Title IV, Chapter II.

[34] Examples are the various contracts regulated in Book III Titles VI-XIV. There are three indications that voluntary obligations arise only from agreed-upon exchanges. Donations are not regulated among the sources of the obligation; they are regulated before them, after the *mortis causa* succession (Title I), and together with testaments (Title II: Of donations during life and of wills). Second, there is Art. 931 requiring that "All acts importing donation during life shall be passed before notaries;" namely, before the representatives of the state. And finally, even if the general definition of contract (Art. 1011) seems to suggest that contracts could be gratuitous, there is Art. 1131 saying that, to obligate, contracts must have lawful *causa*; in other words, a consideration in the eyes of the law.

the realm of simply licit interaction. Promising something to another was, like sending him a poem, talking about a future contract, or celebrating friendship, neither an illicit nor a licit source of obligation. A promise fell into the sphere of the free activity of persons because nothing in promissory scenarios could be seen as injustice. At some point, French courts began to notice that what happened after the revocation of firm promises could be of relevance to the law of obligations.[35] A plaintiff, induced by a defendant's promise to sell him something, rejects pending offers, decides not to take holidays, or even takes out a loan. The courts did not ask what sorts of interests made promisors bind themselves so strongly. They did not seek to apply the justice of licit transactions. They decided to grant the promisee a remedy to the damage caused by the revocation. The justification for these arrangements came from the idea that whoever engenders expectations in others must either meet those expectations or pay for the effects of failing to do so. Courts applied what in private law theory we call "reliance theory."[36] The problem for the French law of obligations is that courts applied a theory that cannot coexist with the theory of the other sources of the obligation. The problem is better seen in what the reliance theory is capable of doing. Under the reliance doctrine, many formerly licit activities cause obligations, from talking about a prospective contract to entering into a love relation. The just division of freedom/obligation was blurred.

We see here a reasoning that is just only in appearance. T (tort), QT (quasi torts), C (contract) and QC (quasi contracts) are made to do J (corrective justice). To ensure that this happens we make T, QT, C and QC with the same JT (technical representation of corrective justice). The need for more categories to do J appears, and rather than making "P" (a new category) with JT (the technical representation of corrective justice), we make "mistaken P" with RT (a technical representation of another value).

The French and the British had problems recognizing promises because the philosophical jurists who inspired their laws explicitly neglected promise.[37] The writers of the German

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[35] E.g. *Cass. Civ. 3éme*, 10.5.1968. I deal extensively with this case in 2.3.

[36] Supporting this interpretation of *Cass. Civ. 3éme*, 10.5.1968 legal comparativist Basil Markesinis *et al.*, *The German Law of Contract*, 2d ed., Hart Publishing, Oxford and Portland, 2006, p. 65.

[37] I am not saying that humans began to make promises in the aftermath of classical private law. Promise scholars like to remind us that the characters of Greek mythology already knew about promises. (Francisco Candil y Bravo, "Naturaleza jurídica de la promesa de recompensa á persona indeterminada," in *Junta para ampliación de estudios é investigaciones científicas*, t. XIII, Memoria 3ª, 1914, pp. 283-339, at p. 285, note 3.) Moreover, the Digest of Justinian instituted legal solutions to very interesting promissory cases. (Digest, 50,12 *De pollicitationibus*). What I am saying is that the nineteenth century lawyers had no tools, or ignored the tools, to treat promises legally. They could not perceive and treat promises simply because the laws they studied said nothing about them. (The French Civil Code has no article on enforceable unaccepted promises; the classical common law opinion on unaccepted promises appears clearly stated in the dissent of judges Finlay, Q.C. and T. Terrell in *Carlill v. Carbolic Smoke Ball*

Civil Code were not all that concerned with the philosophical thought of the jurists, at least when it came to voluntary obligations. Section 657 of the German Civil Code says: "Binding promise: Anyone offering by means of public announcement a reward for undertaking an act, including without limitation for producing an outcome, is obliged to pay the reward to the person who has undertaken the act, even if that person did not act with a view to the promise of a reward."[38] The promise of a reward binds even without acceptance, and (yes, you are reading correctly): the person who meets the condition while ignoring the promise (without expectations of the prize) is entitled to claim the expectation interests. Section 661 provides enforceability to the "Prize competition," as Section 780 does for "Promise to fulfill an obligation," and Section 781 for "Acknowledgement of a debt." The German Civil Code disembarrassed itself of the issue of promises by regulating each typical promissory case as an enforceable act of will. And, if there were a case for which no provision was made, (like, say the promise of a contract), Section §145 establishes that offerors are bound to keep their offers open unless they explicitly reserve the power to revoke them. Once again, offerors are by default rule bound to their offers. The tendency to recognize each unilateral act of will as obligatory in private law was crystalized by a transnational private law called "The European Principles of Contract Law,"[39] which says, in a general provision, "A promise which is intended to be legally binding without acceptance is binding" (Article 2:107).

Co. [1893] 1 Q.B. 256; Savigny's neglect of promises in F. C. von Savigny, *Le obbligazioni*, Giovanni Pacchioni translation, T. II, UTET, Torino, 1912, §61, p. 82-87, esp. 85 attests to the German pre-Civil Code mentality.)

How could that be? Classical private laws are vernacular specifications of the great systematization of Roman and customary law that took place in the 16th and 17th century. The jurists who systematized private law explicitly neglected the possibility that a promise could obligate without acceptance. Famous are the neglects by Grotius (Hugo Grotius, *The Rights of War and Peace*, edited and with an introduction by Richard Tuck, Liberty Found, Indianapolis, 2005, Book II, Chapter XI, n. XVI), Pufendorf (Samuel von Pufendorf, *The Whole Duty of Man According to the Law of Nature*, Andrew Tooke translation, Liberty Fund, Indianapolis, 2003, Chapter IX, number XVI) and Pothier (Robert Joseph Pothier, *A Treatise on the Law of Obligations, or Contracts*, David Evans translation, Strahan, London, 1806, at n. 4, pp. 4-5, a book that considerably influenced the common law; see James Gordley, *The philosophical origins of modern contract doctrine*, Oxford University Press, New York, 1991, p. 134 and Joseph M. Perillo, "Robert J. Pothier's Influence on the Common Law of Contract," in *Texas Wesleyan Law Review*, Forthcoming. Available at SSRN: http://ssrn.com/abstract=610601 (29-1-2016).) In short, classical lawyers, students of eighteenth/nineteenth century law ignored how to treat promises because the inspirers of these laws explicitly neglected promise.

[38] Section 658 (2) qualifies: "Revocability may be waived in the promise."

[39] Ole Lando and Hugh Beale (eds.), *Principles of European contract law*, Parts I and II, Kluwer Law International, Boston, 2000.

In other words, the German Civil Code and the Principles of European Contract Law made it so (with various norms or one simplifying general statement) that every promise obligates. The question arises: Should all promises obligate?

The letter of article 2:107 PECL gives ample room for interpretation. The only thing a promisor must add to make her promise obligatory in private law is a sign indicating that her intention is to be obligated *legally*. Accordingly, article 2:107 includes such distinctive practices as promises to family members, lovers, friends, relative strangers, and promises in commercial settings. Furthermore, a person is obligated to maintain her promise regardless of what the promisee did or does for the promisor. It is unimportant if the promise was made to pay an unenforceable debt or to encourage the promisor to do something—the promise obligates even without reciprocation. Finally, since the definition of this cause of obligation includes no person other than the promisor, one might venture to say, based on the letter of article 2:107, that the promisor would be obligated even if no one else heard the promise… The reality comprehended in article 2:107 is huge. Sooner or later, the legal operator will need some additional material to answer the questions arising in the application of this norm. In adjudicating, in clarifying promissory terms, in filling gaps, the judge will sooner or later need to invoke the justification underpinning article 2:107. Why is it that the promise binds the promisor?

The explanations in vogue are mainly of four kinds: historical, sociological, moral, and economic. The historical and the sociological at some point become either moral or economic (see below Title 4). I want to show that the use of one or other of the available explanations demands that the user accept things that plainly contradict classical private law.

The moralist says that promises obligate because of the duty of fidelity.[40] If you say that promises bind because of the duty of fidelity, then you have to admit that gratuitous agreements bind too.[41] Having done that, you have dismantled contract law. But that's not all. Your next claim must be that the law should punish those who lie. Even if your lie does not mature into another's tangible harm, you should be condemned; for just as failing to

[40] Comparable arguments in Charles Fried, *Contract as Promise: A Theory of Contractual Obligation*, Harvard University Press, Cambridge (Mass) and London (Eng), 1981 (though in chapter 4, especially pp. 40-43, Fried makes a—moral—argument on why promises should be accepted) and Martin Hogg, *Promises and Contract Law: Comparative Perspectives*, Cambridge University Press, Cambridge and New York, 2011, p. 106.

[41] Both Hogg (*Idem*, 274 and ss.) and Fried (*Idem*, Chapter 3) reject the requirement of consideration as a substantive doctrine of law.

keep a promise is a breach of the duty of fidelity, lying is also a breach of such duty. This is okay, but only in the moral domain.

The economist says that promises obligate because the enforceability rule brings more utility to promisors than the unenforceability rule.[42] This is a generalization. There certainly are, as the supporters of this thesis assert, cases where breaching a promise creates more wealth than performing it. It would be better not to enforce a promise, for example, where the social cost of enforcement is greater than the utility of enforcement for the promisor.[43] The law that uses an economic justification for promises is compelled to endorse the second proposition.[44] Could such law be called law?

The private law that incorporates moral or economic justifications must commit to the demands of those justifications. That is, if that law wants to be coherent, if it is to hear such complaints as "why did you decide X in her case, and not also in mine?"[45]

IP.2.2. THERE IS SO MUCH LEGAL MISTAKE THAT PRIVATE LAW IS ABOUT TO LOSE ITS FORM

There is only one way an ongoing normative practice like private law could corrupt itself.[46] Private law seeks to bring order to atypical reality. Instead of thinking of unusual cases in terms of their possible justice, private law thinks of and judges them in terms of "what people would find agreeable," "what our fathers would do," "what a good person must do," or "what maximizes general utility." Private law orders reality in an improper mode of reasoning. The dictum may have nothing to do with justice. Moreover, justice, and the reasoning supporting the new dictum may, in other cases, conclude in a contradictory fashion. Nonetheless, the spurious dictum and its justification now belong to private law. The new arrangement, though it may be mistaken, forms part of private

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[42] Richard Posner, "Gratuitous Promises in Economics and Law," in *Journal of Legal Studies*, Vol 6, (1977), pp. 411-426.

[43] *Idem*, at 414-15. See the clean explanation in the Appendix, at pp. 425-426.

[44] In other works, Posner uses this mode of reasoning to explain all private law. Richard Posner, *Economic Analysis of Law*, 2d ed., Little Brown, Boston, 1977.

[45] Coherence is nothing but the result of the "constant and perpetual will" to do justice (Ulpian in Digest of Justinian, 1.1.10pr), "an effort of will which must not be occasional but generative of a system[.]" Vincenti, *op. cit.*, p. 115.

[46] I am offering a formal explanation of the crisis of private law, an answer to the question, "How is it that a coherent private law became corrupted?" My approach is mainly conceptual. It is inspired by a passage of Ernest Weinrib, *Corrective Justice*, *op. cit.*, p. 301, which says the "…prevailing instrumentalist approaches within the legal academy, exemplified by (but not confined to) certain versions of the economic analysis of law, systemically distort legal practice. This distortion effaces the characteristic concepts of private law, ignores the direct relationship between the parties, and assimilates private law into public law. In these respects, economic analysis fails to comprehend private law as the distinctive kind of normative phenomenon that it is."

law—conforms it. If private law internalizes various realities through improper modes of reasoning, then private law comes to exhibit the mistaken arrangement alongside many others. The idea that the arrangement is mistaken loses legitimacy. Private law is a phenomenon determined not by a former, singular character, but by its ongoing, multiple characters. Private law is no longer coherent—in its form of understanding it is confused.

We are witnesses to a critical moment. Private law is on the point of transformation.[47] We, the jurists, can contribute to the transformation—by endorsing the fashionable mode of reasoning and professing that law should accept its ultimate consequences—or, we can bring justice back to private law. The latter is the path I've chosen for my PhD.

IP.3. WHAT SHOULD THE JURIST DO?

The methodology of private law responds to two guidelines. The first one says that private law exists for regulating *our reality*. Private law must not be seen as an eighteenth century artifact, a historical object,[48] admirable for its elegance and storied past. Private law is an ongoing practice. The realities brought to life in contemporary society are different from those of the modern era. Where new reality has proved itself to be something more than a fleeting fashion, private law must strive to elaborate dicta contemplating and regulating these realities. The second guideline says that law exists to give *its own rule* to things. The rule of private law is the rule of equal freedom. Justice, the idea the law strives to render applicable in social life, is a comprehensive notion. So, law has ample room for new realties. However, justice is not all-inclusive. This means that some of the demands of social life will fail to enter the private law. Law cannot succumb to every sort of demand without losing itself to the past. So, if I had to synthetize the two guidelines of the

[47] Alan Brudner said to Ernest Weinrib that "Economic analysis cannot be accused of justificatory incoherence, for it justifies transactional law in terms, not of a plurality of competing goals, but of a single goal of wealth maximization. Nor can it be hurt by criticisms charging that it fails to capture the nexus between plaintiff's right to repair and defendant's liability or that it understands tort law in terms unwarranted by the concepts and inferential practices embedded within it; for that connection and those concepts are relative to a law for hypothetically dissociated persons that, though with us for centuries, might be evolving toward a functionalist future of which economists are the heralds." Alan Brudner, *The Unity of the Common Law*, Oxford University Press, Oxford, 2014, p. 358.

[48] Aldo Schiavone, *Ius: L'invenzione del diritto in Occidente*, Einadi, Torino, 2005, Part I, Chapter 1, n. 5, pp. 17-18 suggests that private law passed away sometime in the last century and that this sad event gives historians the opportunity to study it properly. (Also in English: The invention of law in the West, Jeremy Carden and Antony Shugaar translation, Belknap Press of Harvard University Press, Cambridge, Mass, 2010.)

methodology of private law in one line I would say that the mission for private law is to order reality without losing its character. [49]

Now, how do we continue private law without transforming it? The method I have developed consists of five steps: the first one could be said to be *sociological*, the second one *critical*, the third *reflective*, the fourth *constructive* and the fifth *evaluative*. Let me elaborate these steps, and show how I have implemented them.

IP.3.1. FIND A RARE NEW CASE THAT COULD BE INTERESTING FOR JUSTICE (PART 1)

The idea is to find cases that are unprecedented in positive laws, but relevant from the juridical viewpoint. Sociological studies are useful for this purpose because they are not constrained by the concepts of the law. Indeed, sociologists can see beyond, or even without, positive legal categories. Sociologists see beyond what our legal categories would enable them to see when they look at reality that positive law straightforwardly ignores. For example, the sociologist could inform us that a contractual party engages herself not only with her counterpart, but also with the counterpart's clients and providers; that business people solve their issues outside of court, with non-adversarial modes of solving conflicts; or that contracts comprise both antagonistic and shared interests.[50] Sociologists see without legal categories when they approach realities for which law does have a category. It could be the case that the law has for long (ad)dressed an atypical reality with a typical legal concept, disguising its genuine morphology. This has been the case for promises. My understanding of the morphology of the juridically interesting promise is very much indebted to the observations of Melvin Eisenberg. If it weren't for the sociological section of "Probability and Chance in Contract Law,"[51] I would still be thinking of promises as implied contracts (the English law approach, see 2.2), atypical delicts (the French law approach, see 2.3), *obligationes ex lege* (German and Italian law approach, see 2.4), or as (moral) promises (the unilateral promise tradition, see 3).

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[49] I take the expression "the mission of law" from Emil Lask, "Legal Philosophy", in Patterson, Edwin Wilhite (ed.) *The legal Philosophies of Lask, Radbruch, and Dabin*, Kurt Wilk translation, Harvard University Press, Cambridge Massachusetts, 1950, p. 37.

[50] A classical work of sociological approach to the matters of contract law or, as one may call it, sociology of contractual behavior, is Ian R. MacNeil, *The New Social Contract: An inquiry into Modern Contractual Relations*, Yale University Press, New Haven, 1980.

[51] Melvin A. Eisenberg, "Probability and Chance in Contract Law", UCLA L. Rev, 45, (1997-1998), pp. 1005-1076.

Part 1 of this doctoral dissertation examines practices that Eisenberg calls "structural agreements," [52] and that I, drawing on the reflections of Gino Gorla, choose to call "interested promises." [53] These are promises made to increase the possibility that something one wants to occur actually comes to pass, like the fake gratuitous promise, where a retailer promises a gift to every visitor of her new store. The retailer promises the gift not for charitable purposes. She does it because she thinks that if the consumer makes the effort to visit her new store—to dress himself, look up the address, and take the bus—he will eventually buy something. By making the promise, the retailer has increased the chances that something she wants will occur; namely, the sale of a product.

The question for the jurist is; why should private law look at these promises? The sensitive scenario presents itself when the promisor makes the promise, the promisee receives and considers the promise, but the promisor then revokes her promise. The lawyer could hardly argue that the revocation goes against contractual justice. For, in contract law, to bar promise revocation the promisee would have to have accepted the promise and given a counter promise or a real right to the promisor. But, the fact that contract law has nothing to say does not mean that law in general has nothing to say. Part 1 settles the hypothesis that the revocation goes against justice in transactions. Even if the promisee gives no promise or real right to the promisor, he has listened to the promise, taken the promise seriously, and holds it as an acquired right. He will find an occasion to visit the promisor's store. Is that enough to bind the promisor? Can we say that the promisor cannot revoke the promise because, according to transactional justice, she got something from the promisee that was equivalent to what she gave with her promise? Well, we have to investigate, but it appears to be a relevant case for justice. Especially since promisors assure that their promises bind them. In other words, they are paying money for chances.

My case above is a clear example of how sociology can help the jurist. Eisenberg tells a story that classical contract law can neither understand nor regulate, and I, through the more abstract perspective of justice in transactions, find it explicable as the exchange of a promise for a chance. It could have been the case that the reality I found had nothing of interest for justice. Then I would have had to acknowledge it, and explain why law cannot attend to such issues. The task is not to use law words to describe what society does,

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[52] *Idem*, p. 1009.

[53] Gino Gorla, *Il contratto*, Vol. I, Giuffrè, Milano, 1954, § 14-16, especially at § 16, p. 188 and ss.

wants, or is assumed to want. The jurist must read sociology, but with scrupulous care—predisposed to reading only juridically interesting practices.

IP.3.2. Appraise whether it was legalized in a mistaken form (Part 2 and Part 3)

In the course of giving legal forms to new phenomena, we need to criticize mistaken legislation. This is necessary for two equally important reasons. First of all, denouncing a mistake defames its source. Let me explain. In Part 2 of this dissertation, I will show that the use of the reliance theory on interested promise decisions corrupts the French law of obligations (specifically 2.3). But the reliance theory was not only applied to interested promises. It came into private law—not only French private law—in myriad cases, including those concerning mistakes in the formation of a contract, unreasonable breach of negotiations, gratuitous promises, etc. In denouncing the inimical effects of this theory in a specific case, I make the reader aware of the theory's flaws. The reader can then find further examples of the same kind of corruption in her own law.

The second reason we should focus on erroneous arrangements has to do with the ultimate goal of the methodological enterprise—the making of new private law. The study and criticism of mistaken legislation teaches us what we should not do, which could be very important. Let me elaborate this point with an introduction to Part 3—the case of the mistaken legal scholarship.

First in Germany, and then in France,[54] jurists developed the idea that a promise creates two kinds of obligations: the first one binds the promisor to his word (no promisee is involved), and the second binds him to do something at the request of the promisee. One might ask why the law should enforce the first type of duty? What sort of duty pertains where there is no creditor? In part 3 of this dissertation I read the work of the precursors to the latest laws on promises, asking how they could arrive at such conclusions. I discover that these scholars were both arguing from improper standpoints, and importing concepts from alien legal orders. Only someone who argues from a moral point of view can say that a promise binds the promisor even if it never reaches the promisee; only someone who builds his theory with conceptual blocks from Germanic—rather than juridical private—law could say that obligations do not need a creditor.

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[54] Heinrich Siegel, Das Versprechen als Verpflichtungsgrund im heutigen Recht, Vahlen, Berlin, 1873. René Worms, De la volonté unilatérale considérée comme source d'obligations en droit romain et en droit français, (thèse pour le doctorat présentée et soutenue le mardi 23 juin 1891, Université de France, Faculté de droit de Paris, by René Worms), A. Giard, Paris, 1891.

IP.3.3. THINK OF THE BEST POSSIBLE JURIDICAL SOLUTION (PARTS 3 AND PART 4)

Still, not all of the promise legal scholarship is mistaken. It has given us a series of teachings without which I could never have imagined my proposal. Indeed, the unilateral promise scholars saw that persons were making irrevocable promises, and that lawyers had no terms to speak of the way a reasonable man would take these promises. The lawyer could not think of promises as enforceable because he lacked the terms for such thought. If there is no acceptance, there is no voluntary obligation. Yet judges and parliaments wanted to enforce promises. There was a pressing practical need, as René Worms liked to say.[55] But legal operators applied the existing legal forms. They would imply acceptances to find contracts and issue *obligationes ex lege*. The promise scholars reacted against such lack of creativity. The law wants to regulate new realities with inadequate rules. The jurist must build theories that effectively address emerging social issues.

So the main lesson we take from the promise scholarship is so that we may propose new forms of law. For me, this means we can try to represent unprecedented reality in terms that make it look like a concept of private law. But, how do we do it? Do we appeal methodologically to the pure idea of justice? That is one choice.[56] But, why should we become enmeshed in such an argumentative process if we already have similar categories? What do I mean? Well, what interested promises try to do is obligate the promisor to the promisee. Contract, tort, and unjust enrichment are deemed to be parts of the same law of obligations for a reason: they all perform the role of describing situations that give place to obligations. The interested promise, in other words, aims at being something like contract, tort, and unjust enrichment.

So, rather than approaching the concept of interested promise from the perspective of pure justice, we could better approach it from an understanding of what tort, contract, and unjust enrichment are. This is an intermediate perspective. It is higher than contract, tort, and unjust enrichment (and so we will not make the mistake of treating the new phenomenon as something it is not) but closer to our reality than pure justice. A perspective that represents the causes of private law liability, and only the causes of private law liability, excludes matters that a perspective of pure justice would include.

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[55] "[…L]a pression de besoins pratiques[…]" Worms, *De la volonté…*, *op. cit.*, p. 84.

[56] Namely, think of the various possible regulations to the case of promise and choose the best. I will do this, but at the end of another process. I will firstly build a proposal (the proposal that I intuitively find the best possible private law regulation) and then conflate it against the other possible alternatives. See the introduction to part 6.

What is more, a form representing the causes of obligation would also represent the technical outlook that the new concept must adopt. I want to build not only a new cause of private law liability, but a cause of private law liability that a contemporary legal system would want to admit. Today, the causes of obligation are built in a form that enables operators to apply them to an indeterminate number of cases. In other words, they are systematic private law concepts, and not situational cases to which the law attaches a legal consequence, like the actions of Roman law or common law primitive writs. "For the reason that Aulus Agerius promised a reward to Numerius Negidius, if it appears that Numerius Negidius should pay ten thousand sesterces to Aulus Agerius, Judge: condemn Numerius Negidius to pay ten thousand sesterces to Aulus Agerius, and if the claim should not be proved, discharge him."[57] Could I deliver such cause of obligation to a modern private law? Certainly not… So, based on these considerations, I realized that I must firstly imagine a structure representing all causes of obligation. The question is: What does a cause of obligation look like?

Section 1 of Part 4 builds the mould for a new legal concept. It transcends existing just determinations of tort, contract, and unjust enrichment, to attain a set of conditions under which all kinds of obligation could arise. This framework largely follows "Misfeasance as an Organizing Normative Idea in Private Law," by Peter Benson.[58] My aim was to build a form with which I could determine the interested promise as another cause of obligation. You can also read this section as a theory, or the general guidelines to a theory, of private law obligation.

Section 2 of Part 4 answers arguments against the possibility of a methodology of private law. Can we build new private law categories? Can private law make progress and conserve its form? These issues have an audience in the arena of legal formalism. No one endorsing legal realism or legal positivism would argue that if law changes, it loses its character. Yet, we are taught that formalists maintain that the process that made the law made all possible law; that legal provisions are indefeasible; and that, consequently, the task of the jurist is limited to subsuming cases in categories to which the law attaches consequence.[59] After a great deal of research, I have failed to find anyone endorsing these three claims. Still, there are critics who say that we, the formalists, believe these things. So, I have to take their arguments seriously. Title 1 of Section 2 of Part 4 dedicates itself

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[57] Inspired from Gaius, Institutes, IV, 40,41 and 43.

[58] Peter Benson, "Misfeasance as an Organizing Normative Idea in Private Law," in *University of Toronto Law Journal*, 60, (2010), pp. 731-798.

[59] This view appears in https://en.wikipedia.org/wiki/Legal_formalism (2-08-2015)

to finding a suitable philosophical foundation for the claims of the caricatured formalist. It finds it in what I call "legal monism," a thesis that holds that all law is contained in a single proposition; an impossibly wrong principle that, if it has been carefully analyzed, warrants the validity of the deduced law. The indisputable validity of the law exhaustively deduced from this principle secures what we formalists call the autonomy of private law.

My strategy against the standard view of legal formalism is more evasive than confrontational. In effect, title 2 of Section 2 of Part 4 develops a different conception of the first principle of law. This conception agrees with monism that all possible private law can be justified by the principle of justice. But it disagrees that law is deduced from the principle. In the view of legal formalism, I maintain, law is the result of the application of the principle to real-life scenarios. Life could present various scenarios, and the principle would apply to these scenarios in very different ways. That explains why Roman law, French private law, along with the future private law, could, despite their differences, be considered three different expressions of the same private law. Likewise, law can be revised. From this view I derive a new conception of the autonomy of private law. This conception demands that private law maintain its distance from other disciplines. But, at the same time, it demands that private law cope with reality. Autonomous characters cannot be held to the past; they make themselves adequate to the context where they happen to be placed.

IP.3.4. BUILD IT… (PART 4 AND PART 5)

The aspirations of the methodology of private law have been validated. Not only do we know that we can make new legal concepts, we have also discovered that this is what the jurist ought to do, that the autonomy of private law demands it. The question then emerges: how do we do it? How do we effectuate legal constructions? Section 3 of Part 4 elaborates rules for making private law.

Title 1 begins with an examination of what sort of judgment legal construction is. I distinguish legal construction from the most typical of the legal judgments, namely, adjudication. I acknowledge that the distinction between adjudication and construction becomes thin when adjudication consists of applying an existing legal concept to a difficult case. However, I elaborate an argument for the claim that it is always possible to distinguish repetition from invention. Legal construction turns out to be a synthesis of an inapplicable legal concept with the image of a new operative concept. Title 2 sets out the procedure for making law. First of all, the jurist must predispose herself to interpret juridically (4.3.2.1). Secondly, the jurist must find an exigency or practice that is in tension with positive law (4.3.2.2). Third, the jurist must think of a concept higher than the

concept she or he believes the new reality to be, like the idea of authorization, subjective right or cause of obligation. This is what we call technical characterization (4.3.2.3). The jurist must now mentally overlap the reality she wants to determine as law with the high concept she intuits the reality to represent, and talk about the one in a way that a listener could be hearing about the other. In other words, the jurist must describe the reality in such a way that another jurist could read it as an example of the high legal concept. This final step is what we call legal determination (4.3.2.4).

In determining the new concept, the jurist must use private law techniques. "Declarations" are useful when the jurist wants to map out normative realities: delineate extensions, depict features, adjudicate places, and elaborate comparisons, in the style of the French Civil Code. The jurist may also want to make a readily applicable piece of law. The jurist must speak in the conditional form, where for every fact X follows a legal effect Y. This is the German "norm-making technique." Subtitle 4.3.2.4 discusses these and other legal techniques, with special attention to "conceptualization." I will try to explain what a legal concept is, in the strict sense, and propose the modern common law concept of contract as an example.

Obviously, not all of a construction is new law; constructors make use of existing operative concepts. But construction is not all about combination either. The time comes when the jurist must create precise new figures. What name do we give the new form? We cannot take the names of other legal concepts. Formalism demands that each legal concept have its own, exclusive name. The jurist can certainly recycle, but may also want to make new names. How do we invent private law names? Title 2 of Section 3 of Part 4 finishes trying to sketch out directives for inventing words that bear the aesthetics of private law.

Part 5 can be read in various ways. The most coherent reading is to understand it as a demonstration that the methodology of private law works. Indeed, the first five sections are dedicated to determining the interested promise as a new voluntary cause of obligations. The interested promise acquires a new name: The unilateral promise. The unilateral promise specifies each one of the requirements that Section 1 of Part 4 said a cause of obligation must exhibit. The result is a new cause of obligation, a phenomenon ordered by the logic of corrective justice, structured like contract, tort, and unjust enrichment, and presented with names that sound like the words of private law. The last section of Part 4 dedicates itself to showing that the concept of unilateral promise fits with the contract, tort and unjust enrichment. This implies that the unilateral promise has its own field of application, or that its reception by a private law will not produce the effect of reducing or distorting the other figures. How do I prove this? I do it first by offering a

classification of the obligations that present each one of the causes (included the unilateral promise) in its distinct place. Second, I compare the unilateral promise with the figure most akin to itself—the contract. Finally, to state the things that a just law would want to hear about a legal proposal on promises, I explain why the unilateral promise would not serve to enforce gratuitous promises or promises among friends and lovers.

Part 5 is also dedicated to the legal practitioner. It deals with scenarios like promises made by mistake and violence (5.2.3.1a.1.), cases where it is not clear whether the proposal was declared as a promise or as an offer (5.2.3.2(c)1), promises of illusory performances (5.2.2.1.c.4), jocular promises (5.2.3.1d.1), promises in family contexts (5.2.3.1(d)), and firm gratuitous promises (5.2.3.1e2). It occasionally gets into the peculiarities of promises in the field of construction contracts (see for example 5.2.2.2.c.3), promises of reward for a found item (5.2.2.1.(a)), and the everyday fact of firm offers to the public (5.2.3.2.(c)). It analyzes various modes of extinction of promissory rights (5.6.2.2), and the implications of the right of the promisor (5.6.3). 5.6.3.2.1 makes the provocative claim that the promisor has an action of restitution as against the third party who profits from her chance without her authorization.

If there is something that Part 5 can contribute to the philosophical scholarship on promises, it is the special attention it pays to the role of promisees. The vast bulk of scholarship on promises centers on the promisor. Some go so far as to neglect the promisee. Here you will find long pages dedicated to examining the role of promisees in simple and interested promises. Indeed, 5.3 is exclusively dedicated to arguing that promisees have a role to perform in the practice of making promises, and 5.4 embarks on a detailed analysis of the act by which promisees create expectations that enrich promisors.

IP.3.5. …AND TEST THE CONSTRUCTION (PART 6)

Part 5 construes the unilateral promise as an interaction whereby two parties exchange "rights." A promisor gives a right to a performance to the promisee, and the promisee produces the chance from which the promisor benefits. The promisor perceives the value of this chance, I maintain, as one who acquires a right to the benefits of the thing of another... (Please see 5.3 and 5.4). Part 5 creates a way of understanding interested promises as an exchange of rights. You see two reciprocal transfers, an exchange of a "promissory right" for the "right to the benefit of the chance." However, Part 5 does not evaluate the legal concept. The question we must answer to test this formal structure is whether these two "transfers of rights" qualify as just transfers of rights. Part 6 tests each transfer separately.

There are at least 500 years of debate on the subject of whether promises can transfer rights. The question is whether someone who neither requests nor accepts the promise can be deemed to have acquired the promissory right. The pragmatic jurist may miss the nerve of such a question: How could someone dislike the opportunity for benefit? However the question has a raison d'être. Rights are like extensions of our personalities. When someone finds our things, they find our very selves. So, a long line of jurists—which begins with Hugo Grotius, and includes authorities like Robert Joseph Pothier—would argue that a credit right must be willed in order to be acquired, either by request or acceptance. Otherwise the promisee finds her personality altered by the unilateral choice of the promisor, which undermines his freedom.

Some unilateral promise scholars have chosen to evade this perennial puzzle. They find it overly dogmatic, and without practical value.[60] I am very happy to say that, after struggling with it, I think I have found a response. My response is that promisors have the freedom to make promises. If my predecessors want to avoid rejecting the possibility no only of promises, but also contracts and right transfers in general, they must accept that the freedom to make promises permits persons to impose rights on non-accepting parties. I ground the freedom to make promises in the broader freedom (or privilege) to contract obligations, which I justify in a methodological appeal to pure justice.

Now, granted that one could transfer a right to a non-accepting promisee, should we also accept that the promisor could benefit from these unilateral interventions? Does something change when your promise not only grants a right to me, but also induces me to do something you want? Section 2 of Part 6 gets into an everyday fact of contemporary capitalist life: the fact that we are constantly bombarded with interested promises. Not only do they fill our mailboxes, interested promises also reach us by radio, TV, email, pamphlets, and mobile phones. We read them on publicity boards, giant posters, and newspapers, everywhere. This everyday fact is solid proof that companies get something out of making of these promises. But, it also shows the other side—that we tolerate strangers engaging us in their business. We, without meaning to, create the chances they are looking for.

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[60] Enrico Camilleri refers to the argument as an "argomento squisitamente dogmatico frutto del pensiero giusnaturalistico e della pandettistica[.]" *La formazione unilaterale del rapporto obbligatorio*, Giappichelli, Torino, 2004, p. 28. Francesco Di Giovanni insightfully notes that one who responds to this argument is one who confirms the meta-theory from which the argument comes, *Le promesse unilaterali*, CEDAM, Padova, 2010, p. 61. In his opinion, it is better to "demystify" the argument rather than contest it (*Idem*, p. 74) and to address the "interesting" question, which is the issue of the cause ("consideration") of the promissory obligation.

Here my voice lowers its tone. It recognizes the trickery of these practices, but asks; what can we do? There are only three possible reactions. First, we make law prohibiting, criminalizing the practice. Second, we simply permit the practice—which amounts to saying that we abstain from proposing anything, and leave the matter to general contract law. Or, we could choose to regulate it. After discarding the first two alternatives, as well as some modes of regulation, like punitive damages, I conclude that the best we can do is to regulate it the way I have presented in Part 5. However, recognizing that some companies could abuse of their freedom to make promises, I have devised an instrument to prevent such abuses (6.2.3.2).

IP.4. Why Just Private Law?

Let me end this introduction with an answer to the question; why should we do just private law?

IP.4.1. Because history is past law…

Studying the history of law is instructive. It informs us about previous experiences with law, and explains how and why a present rule, concept, or principle unfolded in its current form. What is more, this is useful knowledge; it helps us understand our laws, and also apprises us of legal solutions from the past that can be recycled. But, for the jurist, doing history can also be a distraction.

A good example of this is found in the work of Reinhard Zimmermann. In his vast, learned, accessible, and very informative scholarship, Zimmermann proposes and implements what he calls "the historical and comparative approach."[61] Its task is to build a European legal scholarship. What are the steps of this approach? It begins by identifying areas of law that are important for the European project, like doctrines, rules, or concepts related to contract, tort, restitution, or the law of succession. Having identified a piece of interest, we then turn ourselves towards its origins. All paths lead to Rome. From Rome, we walk down the timeline; we go from archaic Roman law to classical Roman law, spend a good deal of time in post-classical or Justinian Roman law, then see how the eleventh century Bolognese received the Digest of Justinian, find out what Bartolo said, ask how the Canonists affected legal development, discuss the work of the scholastics of Salamanca and the reactions of the humanists, mention the contributions of the rationalists, and,

[61] See the program in Reinhard Zimmermann, "Savigny's legacy: legal history, comparative law, and the emergence of a European legal science", in *Law Quarterly Review*, 112, (Oct. 1996), pp. 576-605 and Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today*, Oxford University Press, Oxford, 2001.

finally, explain how the jurists of the emerging nation-states received and modified the *Ius commune*. The work of the legal historian has come to an end. Now, the legal comparativist enters the scene. Her sources are the various private state laws of Europe. She will find commonalities on all levels: principles and rules, terminology, methods of exposition, ways of reasoning, etc. etc. Still, she will find differences. Where there are no such commonalities, she must compare different national solutions: "Is the law of contract based on the notion of promise, or consensus? … When is a mistake sufficiently serious to affect the validity of the contract? … In what way does contributory negligence on the part of the injured party influence his claim for damages? ... How does the law deal with the restitution of unjustified enrichment?" [62] Answers to these questions indicate the various ways in which a legal problem can be solved. "It therefore paves the way towards critical evaluation and rational choice…"[63]

Zimmermann does great work. He gives us a lot of historical material of great juridical interest: various legal pieces solving specific social issues in different ways. Moreover, he orients us in the right direction: in choosing from among the different solutions, we must use "critical evaluation and rational choice." [64] But here is my question: what does Professor Zimmerman mean by "critical evaluation and rational choice?"

The legal historian responds ambivalently...[65]

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[62] Reinhard Zimmermann, "Savigny's legacy…" *op. cit.*, p. 603.

[63] *Idem*, p. 603.

[64] Idem.

[65] As to the question of "rational choice," I find Zimmerman's work rather perplexing. In his article "Savigny's legacy…" *op. cit.*, he seems to be in line with Savigny's method, which is to study some sort of classical law with the intention of abstracting principles of law and then using them to build the modern law. (See Friedrich Carl von Savigny, *System of the Modern Roman Law*, William Holloway translation, vol. 1, Higginbotham, Madras, 1867; conf. Joachim Rückert, "Friedrich Carl von Savigny, the Legal Method, and the Modernity of Law", in *Juridica International*, Vol. XI, 2006.) Indeed, Zimmermann talks about the connections among legal institutions, coherence, the system of private law, principles of law, and other related notions. In this context, the "rational choice" with which we evaluate and build law cannot but be a choice according with private law principles. But, in another article, "Derecho Romano y Cultura Europea," (translated by Salgado Ramírez), in *Revista de Derecho Privado*, No 18, (2010), pp. 5-34, Zimmermann goes in the opposite direction. Here, private law is presented as a reservoir of rules and principles for all tastes. The Roman jurists, with their differing views, gave different, sometimes contradictory opinions in like cases. These opinions—the private law—were used again and again by rulers, judges, and scholars of different times and places. They would choose one or another opinion, and apply, amplify, reduce or modify it at their convenience. There is nothing like coherence in private law. This view actually impedes us from inferring a concept of private law. There is nothing with which one could distinguish private law from other normative orders, like canon law or *lex mercatoria*. One is left with the impression that the only distinctive feature of private law is that it was once written in Latin. Now, what does "rational choice" mean in this new context? If there is a reason for choosing one or another of the private law rules that must be found in the head of the ruler who needs a private law

The jurist's task is to say what the law is in real or hypothetical disputes, and when the conflict at stake cannot be solved by legal norms, to say what the just outcome ought to be. If *we* tell the story of "How the law of contracts evolved so that contract is now about agreement with patrimonial content," or "Why it is that the old, and potentially useful, Canon law category of promise was neglected by the rationalist thinkers of the 16th century" - if *we* look into these extremely interesting, and *per se* relevant, historical questions, we are nevertheless distracted from what we are called to do. We would have occupied our time drawing lines, and explaining discontinuities, and never get down to addressing the issue. Our challenge today is that we have no Code with solutions. Rather, we must implement a mode of reasoning. And being trained in the art of the just and good is its own priesthood.[66] When we distract ourselves by doing historical research, other scholars will do the work that we are called by vocation to do. This is a reason for *jurists* to leave historians to do their work, and to embed ourselves in the office of thinking about social issues in terms of justice.

IP.4.2. …SOCIOLOGY IS REDUCIBLE…

The label "sociology of law" includes a plurality of studies.[67] The most practical—to identify areas of social conflict, and the mechanisms by which society spontaneously resolves them—is nowadays reductive.

Take the work on promises by Professor Melvin Eisenberg. Like all works of legal sociology, his article, "Probability and chance in contract law," begins with a criticism of law:

> From the middle of the nineteenth century until the first part of the twentieth century, contract law was dominated by a school of thought now known as classical contract law. The teachings of this school were based on the premise that contract law, like geometry, could be developed by deduction from axiomatic rules. Like geometry, classical contract law tended to be static rather than dynamic, and binary rather than continuous. Given

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rule. The work of the jurist then consists in identifying the ruler's mode of reasoning and building the private law in a way such that the ruler could like to choose it.

[66] "Anyone may properly call us the priests of this art, for we cultivate justice and profess to know what is good and equitable, dividing right from wrong, and distinguishing what is lawful from what is unlawful; desiring to make men good through fear of punishment, but also by the encouragement of reward; aiming (if I am not mistaken) at a true, and not a pretended philosophy." Digest of Justinian, 1.1.1.

[67] See the essays in Michael Freeman (ed.), *Law and sociology*, Oxford University Press, Oxford and New York, 2006 and Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition*, Cambridge University Press, Cambridge and New York, 2008.

> these characteristics, it is not surprising that classical contract law had difficulty coping with probability and chance…[68]

In other words, society brings a new issue to law—transactions involving chances—and law, owing to its antiquated methods, fails to solve it. Eisenberg now makes a sociological observation. Agents are increasingly making what he calls "structural agreements,"[69] whereby one party promises something to another without requiring either a promise or an act in exchange, like firm offers and reward promises. The key to understanding these transactions, Eisenberg suggests, lies in the psychology of promisors: they make promises to increase the probability of an exchange.

> A firm offer is made not for altruistic reasons, but for self-regarding reasons—to increase the probability of exchange. In deciding whether to accept an offer, an offeree must make an investment, in the form of deliberation and, in some cases, out-of-pocket costs. The offeree is more likely to make such an investment, or is likely to make a greater investment, if he is sure the offer will be held open while the investment is being made. The purpose of a firm offer is to induce the offeree to make such an investment so as to increase the probability of exchange.[70]

Okay, but what should the law do with these promises? Here is the answer:

It is in the interests of offerors as a class that firm offers be enforceable, because under a regime of unenforceability, offerors cannot utilize firm offers to achieve their ends.[71]

The law should enforce these promises because a certain class of persons wants the law to do it. Professor Eisenberg generalizes a new transaction form from the reality of contractual behavior, and generalizes the reason for the enforceability of such a transaction from the very same reality. The class of offerors wants the law to enforce structural agreements, because otherwise they cannot induce promisees to consider promises in a way that increases the probability that they will make an exchange. A jump from the sociology of business practices to economic theory seems reasonable:

> The concept of structural agreements, which is central to Part II of this Article, provides a direct link between transaction-cost economics and contract law doctrine. A major concern of transaction-cost economics is the manner in which various forms of

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[68] Melvin A. Eisenberg, "Probability and Chance in Contract Law", UCLA L. Rev., 45, (1997-1998), pp. 1005-1076, at p. 1008-9.

[69] *Idem*, p. 1009.

[70] *Idem*, p. 1019.

[71] *Idem*, p. 1019.

> governance structures can maximize the likelihood that economic transactions will be seen to completion, resulting in gains to both sides. A structural agreement is a governance structure that is designed and intended to promote the probability of gains through trade.[72]

The reasoning is this: If a class of persons wants to maximize the likelihood of effectuating transactions, and economic theory teaches us the means to produce such effects, then the rules of economy should be enacted as the rules of law. This is true even if these persons are not actually following the economic rules, because the economic rules are what they would want the law to be if they knew of their efficiency. The problem with the sociology of law is that it flows into a strand of functionalism.

IP.4.3. …AND ECONOMY IS ABOUT EFFICIENCY.

Wealth maximizing is, I think, the dominant functionalism in American and European Union private law. Richard Posner has argued for over forty years that justice demands that law be "wealth maximizing." The just dictum is the rule or decision that creates the most wealth. So, if a lawgiver is to pass a law, or a judge has the authorization to develop a new rule or the discretion to tilt a preexisting rule in one direction or another, she or he must rule or decide in a way that maximizes the utility of extant resources.[73]

Now the problem for the jurists is one of competence. Those of us who received a classical legal education lack the tools for making economic analyses, and therefore show ourselves incapable of saying what the most efficient thing to do is. This is also true for those who venture into economic studies with a view to making an academic paper. I base this claim on my experience in the European University Institute, a transnational university dedicated to the study of law, economics, history, and political science. I have felt the distance of our discipline from serious economic thinking when traditionally educated lawyers present economic analyses before professional economists.[74]

Yet my argument cannot rest here. We can always change legal education to provide students with the proper tools for economic analysis. Robin West recently complained

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[72] *Idem*, p. 1010.

[73] Richard Posner, Ethical and Political Basis of the Efficiency Norm In Common Law Adjudication, Hofstra Law Review, 8, (1979), pp. 487-507.

[74] "Questo mutamento di paradigma e il farsi politico da parte del giurista di tipo continentale europeo non gli ha ridato quel prestigio e quell'autorevolezza che agognava: il suo rincorrere valori sempre nuovi, paladino del pluralismo, ma poi schierato ora da una parte ora dall'altra, questo suo andare ondivago ha finito con il consegnarlo definitivamente alla seconda o terza linea nel movimento di divisione delle strutture sociali, e dello stesso diritto, in Occidente." Umberto Vincenti, *op.cit.*, p. 157.

that the top American law schools better prepare their students for reasoning like economists than like jurists.[75] But, is this the *right* thing to do? I want to suggest that it is not. And I stress the word "right" because the grounds for my claim are legal. I want to say that past, present, and future generations of economists—and functionalists in general—have no right to vanquish private law's conceptual apparatus.

It took us centuries to develop our powerful explanatory tools. Distinctions like *quaestio facti* and *quaestio iuris*, right *in rem* and credit right, termination of action as opposed to caducity of right; correlatively-structured notions like right and duty, power and liability, privilege and no-right, immunity and disability; departmental divisions like persons, things, property, and causes of private law obligations; the imaginary of legal lacunae and transfer of right; cannons of interpretation, like literal interpretation, the scope of the norm, historical and systematic interpretation; notions like the reasonable man, good faith, and the nature of the thing; an extraordinary articulable theory of the norm; and a rich and profound scholarship on the freedom of will, which includes classifications of intentional behavior in kinds and degrees…. These are not only powerful tools for describing patterns of behavior. They are explanatory of the just, of life in accordance with justice.

The issue at stake is not that others are using our concepts. To the extent that their use does not damage our concepts' core significations, one could tolerate, give them, as it were, a right to the use of our working tools. After all, distinctions like *questio facti* and *quaestio iuris* and correlatives like duty and right are more of a communal use, a use which, when used according to the thing's reasonable uses, does not necessarily exclude others from their use. The issue at stake is that others are distorting our heuristic tools—transmitting them to others and other generations in ways that prevent us from using them as we used to. What do I mean? Everything lies in our tools' labels.

"Justice," "law," "duty," "right," "tort," and "contract" are all words that excite in the listener not only attention and caution, but also feelings ranging from veneration and respect to fear. Many other symbols may provoke these attitudes and feelings, but of all such symbols, those belonging to juridical discourse are particularly efficacious—especially when it comes to caution and veneration. People feel the impact of the words "duty," "right," and "wrong" because these words have traditionally been associated with the proper understanding of justice: equal treatment, generality, and impartiality; in other

[75] Robin L. West, *Teaching Law: Justice, Politics and the demands of Professionalism*, Cambridge University Press, New York, 2014 (on pages 89-92 the author gives advice on legal education reforms that would re-center justice in the legal academy.)

words, the common good. [76] Economists present their reasoning, premises, considerations, and conclusions, using the words of juridical discourse.[77] At first, the new meanings are not clearly understood. People hear the legal words, and think of their traditional meanings. But, as they are heard again and again, in different contexts, the new meanings begin to be assimilated. As assimilation occurs, the respect and authority that has always been attached to the words is conveyed to the new meanings. Now, as the words of justice appear with new meanings, the old meanings begin to lose actuality. Economic concepts displace law concepts. For "person," we understand "efficient economic agent," for "contract," "market dynamics" and for "right," "wealth-maximizing behavior." The concepts of free will, rights commutation, and equal freedom pass away. In dressing economic concepts in legal words, fake jurists profit from the respect attached to justice and its associated vocabulary while contradicting its significances, expelling justice from our implicit understanding of the social good. The result is respect for the concepts of efficiency, and the oblivion of justice and its rules.[78]

IP.4.4. If law is to be something, it must be rules for the making of justice

My argument comes down to this: If the work of historians is to elaborate narratives about the past, the work of sociologists is to explain human conduct and the work of the economist is to elaborate rules for achieving goals in the least expensive way—and if all of these disciplines have their own methodology and point—what is the method and purpose of law? It seems pretty obvious to me that if law is to do something, this is the elucidation of rules for life according to justice.

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[76] "La faz simbólica del lenguaje adquiere especial relevancia respecto al discurso de la ley también, porque él no sólo goza de presunción de neutralidad, como lo hace el lenguaje corriente en un análisis superficial, sino que se lo considera incluso justo." Gonzalo Casas and López Testa, Daniela, "Una dogmática deconstructiva del Código Civil y Comercial", in *La Ley: Actualidad*, No 93, (21/5/2015), pp. 1-4, at p. 3. See also Chaïm Perelman, *Justice, law, and argument: Essays on Moral and Legal Reasoning*, Reidel, Dordrecht, 1980, p. 24.

[77] "Instead of functioning as vehicles of thought, the legal concepts are at most labels pinned to conclusions once economic analysis has done all the work." Weinrib, *Corrective Justice*, *op. cit.*, p. 304 (for examples see the title "Causation and Intention" pp. 303-305.)

[78] Would my claim that law must only make just law imply that all regulation oriented to establish efficiency would be eradicated from law? Well, economy could still regulate the life of private individuals, in the way that a company might contract an economist to think of the most efficient regulation for its internal life. (In consonance with its etymological sense of eco-nomos or norms for the administration of the home, the place of private, unaccountable life.) But it cannot be the criteria for laws of social life. Yet, if there are various possible just laws, and one is conducive to the achievement of other values like wealth maximization, then one could choose the just law with the added value of maximizing the resources of the juridically ordered practice.

1. THE INTERESTED PROMISE: AN ATYPICAL (JURIDICAL?) TRANSACTION

This part focuses on the phenomenon that we will incorporate into the private law. Section 1 utilizes the sociological research of Melvin Eisenberg to elaborate what I call the "interested promise". Section 2 calls attention to the unprecedented character of the interested promise: classical private law provides no terms for identifying and enforcing such promises. Section 3 strives to understand these promises in private law terms. Here I establish the central hypothesis of my case study: that the interested promise could be interpreted as a classical private law transaction. The relevant facts are that the promisor obligates herself to "gain" the chance that the promisee does what she wants. The chance that the promisor gains seems to be produced by the promisee.

1.1. THE INTERESTED PROMISE AS A TRANSACTION

1.1.1. THREE PECULIAR PROMISES

Ann announces a reward for her lost jewelry. In the announcement, Ann is very clear about the terms and conditions of the reward, and states vehemently, that she will not withdraw the proposal "until recovery of the lost property."

Ms. Smith writes a letter to the general contractor Mr. García, indicating to him that she will provide the service X at the cost of $1,000. In the letter, Smith states in bold letters that García can count on the service proposal as a "firm offer."

The new Magazine "T" enters into the market with a provocative campaign. The company posts letters to potential consumers promising one-year subscriptions "free of charge". The addressed consumers just have to order the magazines—they have no financial obligation to continue the subscription.

1.1.2. THE PECULIARITY OF THESE PROMISES: LACK OF PERCEIVABLE RECIPROCATION

There is something striking about all these cases. Lawyers are accustomed to think that when a person utilizes the words of law to undertake an obligation, it is because the beneficiary of the obligation undertook a reciprocal obligation or gave something in exchange, whether a tangible thing or an action. Our cases cannot be thought of this way. Yes, they feature a person obligating herself to do something at the request of another, but at the same time the parties who would benefit from these obligations seem to be neither obligating themselves nor giving any perceivable thing to the promisor.

Let's take a close look. Ann appears to be saying that she will pay a reward to whoever happens to provide information leading to the recovery of her lost jewelry. It is clear that each individual of the addressed public accrues a benefit from this proposal. They receive

a legally assured *chance*: if they happen to know the whereabouts of the lost jewelry, they can claim a sum of money. In contrast, it is not clear what Ann gets in exchange for her obligation. No beneficiary did any observable thing in exchange for the chance they accrued: Nobody obligated himself, for example, to look for the lost jewelry; nobody acted (say, began to look for the jewelry) or paid (say, one euro) for the assured chance. Yet, if they take Ann seriously, the beneficiaries will think that she deems herself obligated to her promise, and that she will save the promised sum for the uncertain but possible case that one of them provides the information that leads to the recovery of her property.

Likewise, Smith obligates herself to provide a certain service at a fixed cost in the case that García requires it. It is clear that this obligation benefits García. He receives a *legal option* to make a contract. This option warrants that, if he chooses Ms. Smith's service, it will be done for the sum quoted in the promise. García has no duty to choose the service of Smith; by this option, he is free to choose Smith's service or to ignore Smith's promise and do the work with a third party. As another clear benefit, he can use Smith's option to negotiate a better contract with third party subcontractors. In contrast, it is again unclear what the benefit would be for the promisor, Ms. Smith. She did not receive a payment in exchange for her option, as if for example Mr. García had paid $100 for the promised option. Yet Ms. Smith has to keep available the materials and workers needed to effectuate the promised service. For, to judge from her promise, Mr. García can legally require the assured service.

The third case appears even more extravagant. Magazine "T" promises to give one year of magazines to each of the letters' recipients. Each recipient separately receives a *claim right* to demand from Magazine "T" a year of free magazines, but Magazine "T" seems to have acquired nothing in exchange.

Why is it that promisors make such promises? Why would the promisors want to legally obligate themselves to the promisees?

1.1.3. The missing information: Promisors make these promises to induce the promisees to do something they want

Why is it that Ann, Ms. Smith and Magazine "T" want to obligate themselves? Sociological observations give us a hint.[79] These agents want to obligate themselves in order to induce

[79] By sociological studies I refer to studies that aim to identify and describe the practices of private citizens in the civil society. These are not legal studies. They do not derive their inferences from legal norms, doctrines and principles, or practical ideas of reason. As researchers in this field like to say, they study what private citizens "actually do". For this reason, these studies are not constrained by legal ideas. They can see beyond what the positive law or justice says or would say. These studies do not necessarily have to be independent from legal studies. They do not necessarily have to be published in sociology journals. They are very frequently admixed with legal research, sometimes as a preface to a criticism of the state

other agents to do something they want. By granting their respective promisees with an assured chance, option or claim, these promisors give the promisees reasons to look for the lost jewelry, buy the proposed service or become consumers of the new magazine. These promises don't necessarily provide promisors with what they ultimately want. It is not assured that Ann will have her jewelry back, that Smith will sell her service, or that Magazine T will recruit consumers. Yet the promises increase the likelihood that the promisors will get what they want. Other commercial tools like contractual offer do not have this effect. We call this phenomenon *the creation of a chance*. Agents in civil society are paying for these chances. It is paramount to elaborate this further.

1.1.3.1. SINCE THEY CAN'T GET WHAT THEY WANT…

All these agents want a certain thing. Ann wants to recover her lost jewelry, Ms. Smith to sell her services, and Magazine "T" to recruit consumers. These agents want these things, but for one reason or another they have no means to get them directly. Ann may have found it too expensive to pay for a detective who, committing himself to look for the lost jewelry, cannot even guarantee the satisfaction of her wish. Ms. Smith cannot simply demand Mr. García to buy her service. The same applies to Magazine "T". In other words, the commercial instrument called a "contract" is either inefficient and/or ineffective in providing them with what they want.

1.1.3.2. …PROMISORS RECUR TO INDUCE PROMISEES TO DO WHAT THEY WANT.

When they cannot get what they want, these agents will try to improve their probability of success by *inducing* others to do what they want.

They first elaborate a business proposal. This proposal emphasizes the benefit to the recipient of the proposal. For example: "I will reward you in the case that you happen to find my lost jewelry"; "You have the option to demand the service X from me if you ever want it"; "You have a claim on a one-year magazine supply." The chance to receive the reward, the option to make the contract and the claim to the magazines are all things that the recipient has "gratis", at his disposal. There is nothing detrimental for the addresses in these proposals: they don't have to do anything. The promisors want the promisees to take these proposals as convenient choices for action. As we will see in more detail in 5.2.,

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of the law, other times as the annunciation of a new legal order. We use them as indicators of possibly interesting legal phenomena. See IP.3.1. and 4.3.2.2.

The study from which I draw my own account is Eisenberg, Melvin A., Probability and Chance in Contract Law, 45, UCLA L. Rev., (1997-1998), pp. 1005-1076.

promisors design their proposals in close consideration of the interests and comparable choices of their promisees.

They present these proposals in the form of a promise. These agents want to present the proposal as a firm proposal, something that stands from the moment of its reception and remains in place. They do not make the validity of the proposal conditional on the accord of the addressee. They are not interested in knowing whether the addressee likes the proposal or not. They may even speculate that their addressees are *prima facie* aloof to the proposal. Primarily, they want the addressees to *know* that the chance, option or claim is there, available for them, as an acquired right.

To invigorate the promise, the promisors communicate it with a language that resembles the language of the law. The law's language is clear and venerable; it inspires security. Recognizing these attributes in the language of the law, they adopt legal-sounding language for their purposes. Hence they use words like "firm offer," "irrevocable proposal" and the like—words which, though lacking a clearly defined legal concept, invoke the law and its serious aura. They make (let us say) a "legally intended promise".

The expected outcome is that promisees find these proposals comparatively attractive choices. Let me go back to Ann's case. Before her promise, someone who knew of the jewelry's whereabouts might have no incentive to provide the requested information. Say that Ludvig knows that Jonathan, a thief, stole and now possesses the jewelry. Ludvig wants to provide the requested information to Ann and the police. However, he knows that by doing so he puts his safety at risk. After Ann's promise, all other things being the same, he has an incentive to provide the information. He may put himself at risk, but stands to earn a significant sum of money. The promise has increased the probability that the promisee (Ludvig) will do what the promisor (Ann) wants. We can refer to this inducement effect as the *creation of a chance.* I dedicate 5.4. to a detailed study of this phenomenon.

Promisors chose to make promises rather than simple offers because they see that offers do not create the desired chance. Ms. Smith, who is well acquainted with the dynamics of work contracts, knows very well that the general contractor won't consider her service if she presents it as an offer. The general contractor solicits proposals to determine the costs of a project. Since offers state the terms and cost of services, they do serve to calculate costs—but offers can be changed and revoked. The general contractor will not consider the offer because he cannot make a definite calculation with an offer that is revocable at will. If she just makes an offer, Smith is unlikely to sell her service. Similarly, the commercial team of Magazine "T" has recognized how unlikely it would be that a

magazine consumer would change his/her preference and choose a new magazine if they just put the new magazine on sale.

Promisors pay the costs of their promises even if they don't know whether they will ultimately get what they want. If acting prudently, Ms. Smith will have to freeze part of her assets. She will no longer be able to sell her work and capital in a way that could frustrate García's option. For example, she shouldn't offer the same service to a third party if it would prevent her from carrying out the promised work. Yet she still makes the promise based on the consideration that the possibility that García buys her service is worth more than the costs of the obligation she incurs. Likewise, when Magazine "T" gives away free issues, the commercial team has made a scientific calculation: if 30 claimants of the free magazines go on to buy a yearly subscription, they will pay for the magazines wasted on the 70 claimants who consumed the free issues but did not subscribe to the magazine. Promisors make an analysis that the *chance* they obtain through their promise is worth the cost they pay.

1.1.3.3. MORE EXAMPLES

We can summarize the observations above in two points. First, lawyers can find sense in cases where agents ideate exchange proposals and present them to others as legal commitments. These two elements—the proposal and the promise—make sense when thought of in connection with another point: that promisors obligate themselves in order to induce the promisee to do something they want. Second, the point of all these cases is different to the point of other types of cases. It differs from other, more immediate means of acquiring what one wants, in that it procures a *chance* to gain something, not an immediate gain—rather than procuring me the fact that another does what I want, the promise procures me the chance that another does what I want.

I want now to elaborate a third point: there are more cases like these. The examples provided so far illustrate, respectively, a "promise of reward", a "promise of a contract", and what I call a "fake gratuitous promise". [80] I chose these types of promises because of

[80] Note that the same types of promises could manifest themselves with different content. Another promise of a reward would be this: Captain C promises all the effects in vessel T to the person who saves T from shipwreck. A very particular type of promise of a reward is the so-called "promise of a prize." Here, the promisor offers a prize to the winner of a challenge. The promisees are either specifically appointed promisees (I promise X, W and T that whoever does X will be entitled to claim the prize P) or individuals of an addressed public (I promise that anyone who does X will be entitled to claim P). The promisees obtain the right to compete for a prize and the promisor obtains the benefit of the chance. For example, in the promise of a prize for a scientific discovery, the promisor obtains the chance that many able researchers will compete to discover whatever the promisor needs to be discovered. We think of multiplied affords trying to do what the promisee wants. The announcement usually establishes that when the winner of the competition requests the prize, the promoter will have right of use to the

their popularity; only with popular examples could I best explain the more general concept and its rationale. But other cases show the same form.

In a "bonus promise", a person grants to her dependent or affiliate the right to have something if he or she accomplishes a task. For example, Company A promises its employees a bonus of three months salary if production is increased by 30%. University B promises its PhD candidates that it will increase their scholarships by 5% with each language test they pass. The company is evidently interested in increasing their sales. Better-prepared PhD candidates make a better university. Thus there is a greater chance that the company will sell more or the university will gain prestige, which is what promisors of this kind generally want. Bonus promises are like promises of reward. The difference is that there is a pre-promissory link between the promisor and promisee.

In a "unilateral warranty", the promisor says to the promisee that the promisee can make a certain contract with a third party with the confidence that the promisor will pay as a subrogate of the latter. For example, constructor A promises bank B that if B loans $X to subcontractor C, A guarantees the debt. At first glance there is no benefit for A. The missing information is that A has a shared interest with C. As she is more solvent than C, and B knows it, A makes a promise to encourage B to do something she wants: make the loan to C.

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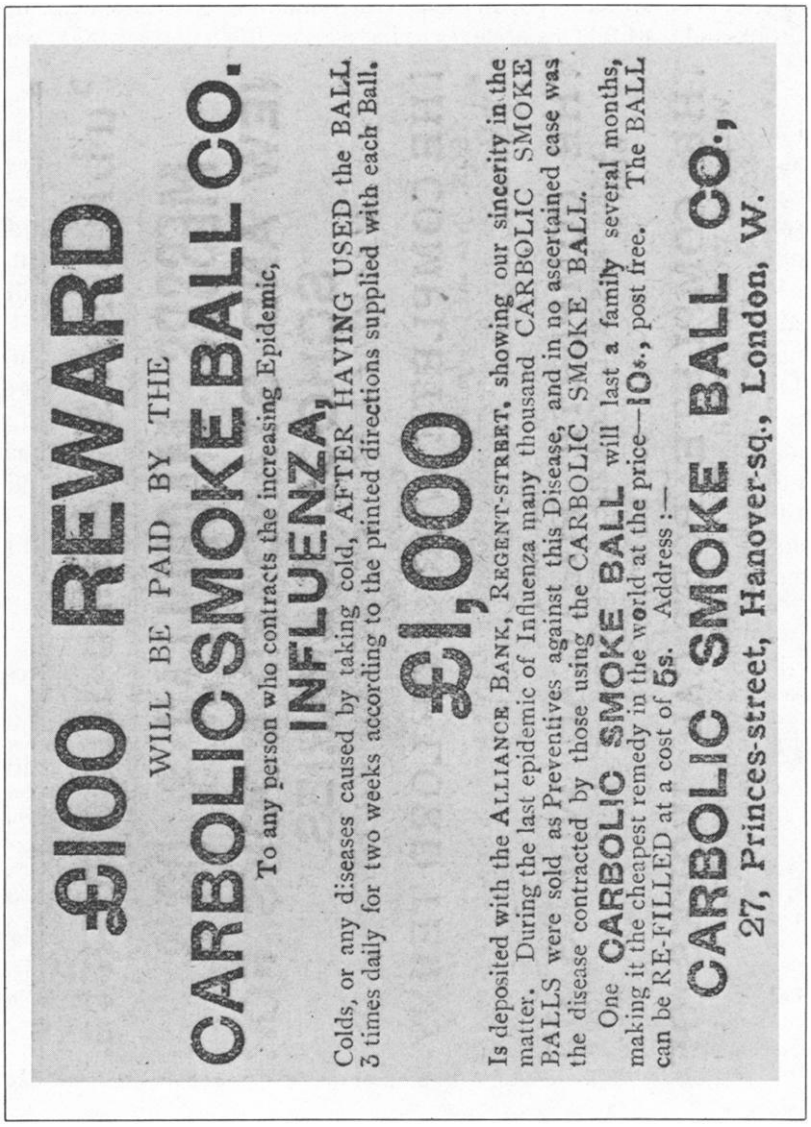
discovery, "without further compensation". We will have the opportunity to deal with this promise in 2.2., where we deal with an example of this type of reward promise: the announcement of auctions with the clause "without reserve".

Other examples of a promises of a contract could include: (1) Company A promises that it will maintain Y´s price for 3 months; (2) A promises to employ B if B quits B's job or B´s current employer fires B; (3) Retailer A makes vending machine X selling products X1, X2 and X3 to any pedestrian B paying a fixed price; (4) Seller A promises a 2% commission to broker B if B sells A's real estate at the price of $X or more.

Other examples of the fake gratuitous promise include: (1) Laboratory F promises any buyer of product P that P is effective; (2) Laboratory A promises a gift to any consumer of medicine A1 who contracts influenza in the week following consumption; (3) Developer A promises free holidays to B so that A can sell something to B; (4) Shop A promises a gift to anyone who visits A's shop in the hope that the visitor will buy something.



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CARBOLIC SMOKE BALL CO.,

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The advertisement appeared in a London journal, the Pall Mall Gazette, November 13, 1891. It had the rhetorical power to induce Mrs Carlill to purchase the carbolic smoke ball. She consumed the remedy, got the influenza and claimed the reward. Company failed to honour the promise and refused to pay. See a short discussion of *Carlill v Carbolic Smoke Ball Co*. in 4.3.3.1.(D1).

Taken from A. W. B. Simpson, "Quackery and Contract Law: The Case of the Carbolic Smoke Ball," in *The Journal of Legal Studies*, Vol. 14, No 2 (Jun. 1985), PP. 345-389, at 357

Another is the case of the so-called "lettre de patronage". The promisor says to the promisee that the promisee can make a certain contract with a third party with the confidence that the promisor will do whatever is necessary for the third party to pay her debt. Controlling Company A promises bank B that if B loans $X to A's subsidiary Company C, A will do whatever is necessary to ensure that C has funds to meet its obligation with B. The promisor is not obligating herself to pay in case of a default by the main debtor, as in the unilateral warranty. Here, the promisor instead obligates herself to do whatever is necessary for the main debtor pay her debts. There are plenty of similar cases.[81] The *title of credit* should be intelligible in the same mode too.[82]

1.1.4. THE TRANSACTION CALLED "INTERESTED PROMISE"

Now, in the light of these three points—in summary, that some typically peculiar cases are intelligible in the same mode, that the intelligence of these cases is different than the intelligence of other cases, and that the most popular examples of these cases seem not to exhaust the possible variants of these cases—we can infer the following conclusion: there is a new transaction mode.[83]

I will call this transaction mode the *interested promise,* for the obvious reason that, although the promisor obligates herself unilaterally, she obligates her self for the

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[81] The case of a promise of payment or recognition of debt—by which I promise you to pay an unenforceable debt—could also be included in this category. In fact, the 1942 Italian Civil Code characterizes it as a "unilateral promise" (Art. 1988). But "…regarding the promises regulated in Title IV [unilateral promises], only the promise to the public (art. 1989 ss.) … is unarguably fitting in the genre [unilateral promise] and is productive of obligatory effects of transactional origin. On the promise of a payment and the recognition of debt, an authoritative scholarship not only doubts whether they could be distinguished, because to recognize a debt implies the promise of performing it and vice-versa, but also holds that they must be taken away from the field of the transactional autonomy to the field of evidence, more precisely to the field of confession…" Pietro Rescigno, "Obbligazioni (nozioni)," in *Enciclopedia del Diritto*, Vol XXIX, Giuffrè, Varese, 1979, p. 159.

[82] There are three typical cases of the title of credit. (1) A signs a note promising to pay $X to B at the place and time Y; (2) A signs a note ordering A's agent to pay $X to B at place and time Y; (3) A signs a note promising to pay $100 to any holder of the note at place and time Y. The reason that A obligates herself to pay, as in the other interested promises, must not be looked at the text of the promise (as lawyers unfortunately do) but at the transaction where the promise is inserted. A promises to pay $X to B because A received some tangible thing from B, will receive some tangible thing from B, speculates to receive some tangible thing from B, or hopes to do some fruitful business with B. The title of credit could be issued in order to give rather than pay something, as when sugar warehouse A issues a note promising 10 tons of sugar to any holder by Y day.

[83] I draw on Ernest Weinrib's conceptualization of form. See "Legal Formalism: On the Immanent Rationality of Law", in *Yale Law Journal*, Vol. 49, No. 6, (May, 1988), pp. 9466-1016, at pp. 958-961. Note that I formalize this transaction mode not as a legal transaction but as a mode in which agents *in civil society* promise an obligation for a chance. In other words, no claim is advanced as to whether this social reality is a juridical reality.

acquisition of a benefit—not disinterestedly, charitably or *gratis*.[84] This benefit, the thing that the promisor acquires, is a chance, the increased likelihood that the promisee does what the promisor wants. I want to emphasize that I use the name "interested promise" to refer to a social practice, not to an existing legal act.

1.2. THE INTERESTED PROMISE HAS NO REPRESENTATION IN CLASSICAL PRIVATE LAW

1.2.1. THE INTERESTED PROMISE INTENDS TO CAUSE AN OBLIGATION

The interested promisor uses words that any reasonable person would take as legal. She invokes these words to ensure that the promisee takes the promise as a seriously intended promise, and therefore will consider it seriously, creating the chance that the promisor is looking for. But in using legal words, the promisor is not only giving the promisee reasons to take her promise seriously, but also submitting herself to the game of private law.

In the world of private law, what the interested promisor is trying to do is called a "cause of obligation". Causes of obligation are *facts* that a private law orders as criteria for identifying and justifying obligations. (Please see 4.1.)

1.2.2. THE INTERESTED PROMISE DOES NOT FIGURE AMONG THE CAUSES OF OBLIGATION…

But if we look at the French Civil Code or at the set of rules, concepts and doctrines defining the classical common law, we find no cause of obligation for the interested promise.[85] The general categories with which a lawyer would identify obligations in interactions are the tort and the contract. And tort or the idea of an action for correction of harm caused by a wrong and contract or the idea of an action for the enforcement of an agreed exchange of rights are, as we will see from different angles, different in character with the interested promise. On the other hand, the provisions that classical private laws

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[84] I take the phrase from the Italian doctrine. There, the link between the voice and the transaction mode seems to have acquired usage. One commentator, for example, refers to our promises as "quelle che ormai *si suole chiamare* <<promesse interesate>>". Francesco Di Giovanni, *Le promesse unilaterali*, CEDAM, Padova, 2010, at 92 (The italics are mine). Gino Gorla was probably the first author to use this term. See Gino Gorla, *Il contratto: problemi fondamentali trattati con il metodo comparativo e casistico*, Vol I, Giuffrè, Milano, 1954, in § 14-16, especially at § 16, pp. 188 and ss.

[85] I only consider classical private laws. I don't take the German Civil Code as a classical private law because, in my opinion, this book is not primarily a book on justice applied to transactions between free agents. Yes, much of it is definitively determined by the idea of corrective justice. (See 4.1.1.1. and 4.1.2.3.) But many critical points—like the norm establishing that offers are irrevocable by default rule (§145) or the absence of the doctrine of cause or consideration—cannot be thought of as juridical determinations. My hypothesis is that these examples were determined to serve the interest of a class—the merchants. For some reason, this class's interests were thought of as legitimate. (Further criticism in 2.4.)

establish for what they considered atypical cases contemplate cases of enrichment without cause, harm without fault and duties towards relatives in need; nothing like a provision saying "a promise of a reward binds from the moment of its reception." In short, classical private laws present no legal terms regulating the practice of making interested promises.[86]

1.2.3. …NOR IT CAN BE THOUGHT OF AS A CONTRACT

Still, if we had to dress an interested promise with modern legal cloth, what legal dress would we choose? We would choose the contract. The interested promise aims to create a voluntary obligation between promisor and promisee, and in classical private laws the only cause of voluntary obligations is the concept called "contract". Could we represent the interested promise as a contract? Let us investigate.

1.2.3.1. TO START WITH, IT IS DIFFICULT TO FRAME A PROMISE AS AN OFFER

In juridical private law, the formation of a contractual obligation requires that an offer meet an acceptance with consideration. The formation process begins with an offer. Can we frame a promise as an offer?

An offer is an invitation to accept an exchange of rights. The concept of offer was designed for a situation where a person says to another: "Look, I want to give you X and you to do Y, so why don't we agree that I will give you X and you will do Y?" But a promisor *is not* addressing someone with the intention to agree with him on something. She is addressing

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[86] Interestingly enough, the Digest of Justinian provides an institution with which a lawyer could see and treat interested promises. This institution is the *pollicitatio* or promise of a person to a city (*res publicae*), concerning the giving of a sum of money or donation of a certain type of work. This promise would bind when it was made in view of acquiring an honor, like a public office. For example, a Roman citizen, in view of the coming elections for the position of magistrate, declares to the public that he will rebuild the city pillars if he is elected. The declaration of this promise bound the promisor, although the actualization of the condition conditioned the promise's performance. See Digest of Justinian, 50,12 *De pollicitationibus*. The analogy with interested promises is evident.

But the *pollicitatio* did not survive to the private law's rationalization. In a juridical private law, voluntary obligations arise when the promisee accepts a promise and makes the required counter-promise or act. See Hugo Grotius, *The Rights of War and Peace*, edited and with an introduction by Richard Tuck, Liberty Found, Indianapolis, 2005, Book II, Chapters XI, VI and XII (Conf. Peter Benson, Grotius's Contribution to the Natural Law of Contract, Canadian Journal of Netherlandic, Vol. 6, 1985.) Here the *pollicitatio* is seen as a matter of Roman positive law. Hugo Grotius, *op. cit.*, Chapter XI, n. XIV. Robert Joseph Pothier, to many historians the father of Book Three of the French Civil Code, takes Grotius's views to say: "A pollicitation, according to the rules of mere natural law, does not produce what can be properly called an Obligation" Robert Joseph, Pothier, A Treatise on the Law of Obligations, or Contracts, David Evans translation, Strahan, London, 1806, § 4 p. 5. The French Civil Code says nothing about the pollicitatio, nor, as far as I am concerned, does the classical common law. See an historical review in Javier Habib, *La voluntad como fuente de obligacion: Revista historica y perspectivas de futuro*, (Thesis for the "Grado de Salamanca"), University of Salamanca, 2010, n. 2, B, II.

someone with the intention of *giving him something.* In promises, promisors say to promisees, "Look, I want to give you X in the case that you do Y, so be sure that I will give you X in the case that you do Y." The act is rather different.

So the answer is no. The language of offer is not suitable for promises because promisors are not looking for acceptance. As we have said, an interested promisor could guess that someone is aloof to receiving a promise from her and yet still make it, so that the addressee has it and considers it. (More in 5.3.2.1./2.)

The inappropriateness of the concept of a contract for the interested promise could emerge with even greater clarity. We must just force the interpretation. What happens if we present an interested promise as an offer anyway?

1.2.3.2. A POSSIBLE INTERPRETATION: THE COMMON LAW'S OFFER OF A "UNILATERAL CONTRACT"

As a matter of fact, there is a kind of offer that looks very much like a kind of interested promise. In this offer, the offeror says to the offeree "I will give you $100 if you walk across the Brooklyn Bridge."[87]

Anglo-Americans know the transaction proposed in this offer as a "unilateral contract." The contract is unilateral in that it causes obligation only to one party of the transaction. Only the offeror will be obligated to give something to the offeree. As this is somewhat comparable to the interested promise, one could be tempted to take an interested promise as an offer contemplating a unilateral contract.

So Ann makes her promise to the public and the public understands it as an offer of a unilateral contract. In the public's mind Ann said, "I will give you $100 if you find my lost jewelry."

1.3.2.3. THE ISSUE: THE POWER OF REVOCATION NEUTRALIZES THE POINT OF THE INTERESTED PROMISE

The interpreter who is acquainted with the law of unilateral contracts[88] will think this way: Ann is not interested that I say, "Yes, I will try to recover your lost property." She is

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[87] See Maurice Wormser, "The True Conception of Unilateral Contracts", in *The Yale Law Journal*, Vol 26, No 2, (Dec, 1916), pp. 136-142.

[88] Nobody better than Wormser explains the justice of unilateral contracts: "It follows logically that A is perfectly within his rights in withdrawing his offer before B has accepted it by walking across the bridge—the act contemplated by the offeror and the offeree as the acceptance of the offer. A did not want B to walk half-way across or three-quarters of the way across the bridge. What A wanted from B,

not calling for my commitment. She is interested that I find her lost property and give it back. She invited me to *accept* her duty to pay me a reward with a deed. To acquire the right of her promise, accordingly, I must do what she wants. Unless and until I do what she wants, she has no obligation towards me. As there is no obligation, she can act as if she had never made the offer. She just has to tell me that she is not interested that I recover her lost jewelry. As I know that she can revoke the offer, I have reasons to fear that Ann will repent and withdraw. Her proposal comes with a natural risk—that someone else delivers after I spent time and resources looking for the jewelry. But in addition to this risk, there is another—that Ann might revoke the promise as soon as she wishes and without justification, even one second before I delivered the jewels. There is nothing I can do. Verbal acceptance is ineffective against an offer of a unilateral contract. She wants to be obligated *only if* I fully perform the requisite act. Since I run too high a risk, I have fewer incentives to embark on the enterprise. As a result, what Ann wanted—that I embark on the enterprise of looking for her lost property—will probably not happen. For, considered as an offer, the interested promise is not appealing me enough.

In conclusion, agents propose exchanges to others through legal promises to give them a reason to participate in their proposals. But they cannot obtain what they want. The category with which a person would best interpret an interested promisor's messages is the offer of a unilateral contract. But, as illustrated above, when they think of the promise as an offer, they have no sufficient reasons so as to participate in the proposal—they therefore never create the sought chance.

1.3. HYPOTHESIS: THE INTERESTED PROMISE COULD BE THOUGHT OF AS A JURIDICAL TRANSACTION

Interested promisors cannot be said to be obtaining what they want because we assume that promisees think with the old private law categories. The blunt fact is however that agents in contemporary civil society do understand what interested promisors say and want with their promises. Not only that. Promisees many times rely on their promises.

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and what A asked for from B, was a certain and entire act. B understood this. It was for that act that A was willing to barter his volition with regard to $100. B understood this also. Until this act is done, therefore, A is not bound, since no contract arises until the completion of the act called for. Then, and not before, would a unilateral contract arise. Then, and not before, would A be bound." *Idem*, p. 137. "To the writer's mind, the doctrine of unilateral contract is thus as just and equitable as it is logical. So long as there is freedom of contract and parties see fit to integrate their understanding in the form of a unilateral contract, the courts should not interfere with their evident understanding and intention simply because of alleged fanciful hardship." Idem., at 138. "The writer can see no injustice whatever in the operation of the doctrine of unilateral contract. It is logical in theory, simple in application, and just in result." *Idem*, p. 142.

This is to say, they begin to look for the lost jewelry, incur in expenses in view to make the promised contract, order the magazine year subscription, and so on and so forth. [89] So, in the world of life of in contemporary reality, the power of revocation turns to play in the promisor's favor. Promisors profit from the fact that people believe their promises and may and many times decide to embark on doing what they want, and, in addition, they keep the power to repent and withdraw their proposal. In other words, promisors get the chance they want and keep the power to give it back without paying what it cost them.

We see a mismatch between private law and social reality! Could private law regulate these promises?[90]

Before proceeding, let me clarify some concepts. To regulate is to put an order to a certain circumstance. "This party said X in conditions Y to that other party" is a circumstance. To this circumstance, the regulation attaches an order. "This party will have to do X whenever the other party demands it". Still, all regulation presupposes, necessitates and exhibits, a regulative idea. For example, "we will order that every interested promisor will have to act in accordance with her promise because doing what one promises enhances the welfare of the civil society." The "because", or the reason that grounds the regulation, exhibits the regulative idea (of the regulated practice). The regulative idea is the justification or explanation to the question "Why is it that this order follows that circumstance?"

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[89] "The fact of the matter […] is that very reasonable people spend substantial time and money doing the sorts of things that unilateral contracts attempt to induce them to do." Peter Meijes Tiersma, *Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise,* 26, U.C. DAVIS L. REV., (1992), pp. 1-86, at pp. 32-33.

[90] The following is the attitude that I chose to resist:

> From the middle of the nineteenth century until the first part of the twentieth century, contract law was dominated by a school of thought now known as classical contract law. The teachings of this school were based on the premise that contract law, like geometry, could be developed by deduction from axiomatic rules. Like geometry, classical contract law tended to be static rather than dynamic, and binary rather than continuous. Given these characteristics, it is not surprising that classical contract law had difficulty coping with probability and chance, because rules that center on those elements tend to be dynamic rather than static, and continuous rather than binary.
>
> From the perspective of the realms of chance and choice…

Eisenberg, "Probability and Chance…", *op. cit.*, pp. 1008-9. After having explained why contract law cannot work with the interested promises, the author choses to change the perspective from which to see and treat the unexplained material. What I do is rather different. I accept the critic but I do not change perspective. As the jurist that I want to be in this work, I want to see and treat these promises from the perspective of private law. But as the concepts of classical private law prevent me from seeing and explaining what I want to see and explain, what I do is to give some steps back, as it were, to have a better view point. In Part 4 I reach the point of view of justice in transaction… but always looking from the same perspective.

1.3.1. THE INTERESTED PROMISE APPEARS AS A REGULATED PRACTICE

To be sure, the practice of making interested promises presents itself to the law as already regulated. The promisors obtain the benefit of the chance because the promisees believe in the interested promises. And the promisees believe the interested promises because, for some reason, they think that from the circumstance "promise" there follows the order "voluntary obligation." If promisees did not believe in the promises they are addressees of, they wouldn't find the promise an interesting business proposal, and therefore would not be encouraged to participate in it.

If the law is interested in regulating the interested promise, the law shouldn't get too much into the question of "what should follow from the circumstance." If at all, private law should recognize the interested promises as they are.[91]

But if this is so, what regulative idea could private law use to explain the linkage between the circumstance (interested promises) and its natural rule (promisors should do in accordance with their promises)?

There are many ideas dictating that promises should be enforced and the law whose aim is to attach an "obligation" to the circumstance "interested promises" could adopt any one of them. As a matter of fact, the reason that specific promisees believe in specific interested promises is already a regulative idea. Mr. García could believe that Ms. Smith's promise will be performed because Mr. García knows that Ms. Smith is a good Catholic, and Catholics must do what they promise.[92] I would think the same of my promisor if I know that she read Kant's Critics of Practical Reason and endorsed Kantian ethics as her morality. The principle of Catholic moral theology is different to the principle of Kantian ethics. Nevertheless, they both conclude that promises should be kept.

1.3.2. THE (UN)IMPORTANCE OF SOCIAL REGULATIONS FOR PRIVATE LAW

As a mater of fact, the study from which I first learned of interested promises presents us not only with the circumstance and the rule, but also the regulative idea.

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[91] I develop this claim in 6.2.2.

[92] As a matter of fact, medieval canonic law established an obligation to promise. Not in order to take care of the *utilitas privata,* but in order to take care of the *utilitas publica* of the ecclesiastic society, which demands the repression of the sin *tangens periculum animarum*. Guido Astuti, "Contratto (dir. interm.)", in *Enciclopedia del Diritto*, Vol IX, Giuffrè, Varese, 1961, pp. 759-784, n. 9., pp. 774-6, spec. at p. 775 (arguing that the factor that canonic law takes into account to establish the obligation of promise is its Theologico-Moral function of showing the path to salvation)

> it is in the interests of offerors as a class that firm offers be enforceable, because under a regime of unenforceability, offerors cannot utilize firm offers to achieve their ends.[93]

Eisenberg believes that actors are making these promises and committing to perform them because it is in their interest as a class to make and perform these promises. Moreover, he believes that the law is gradually enforcing these promises as it recognizes that they serve the interest of commerce. Finally, he sees this development as a just legal development. Eisenberg, in other words, thinks that the reason that promisors commit to their promises is the same reason that the law is enforcing and ought to continue enforcing the promises that benefit promisors. The social regulation and the legal regulation are, in Eisenberg's thought, one and the same thing.

I believe that private law has another, more *proper* regulative idea to implement here: private law could regulate the interested promises in accordance with justice, which is its own, proper regulative idea.

1.3.3. JUSTICE IN THE INTERESTED PROMISES: "A PROMISE FOR A CHANCE"

Recall what we have said about the interested promises. The promisor wants the promise to *obligate* her to the promisee so that the promisee takes the promise seriously and considers its content as a possible spur for action—thereby creating the *chance* that he does what the promisor wants.

Now, it is the case that in just private laws, a person becomes obligated to do something to another when, in a legal transaction, the debtor of the obligation obtained something that the creditor of the obligation gave in exchange, or lost against his will. (See 4.1.3, specifically 4.1.3.3.2.)

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[93] Eisenberg, "Probability and Chance…", *op. cit.*, p. 1019. The jump from sociology of business practices to economic theory seems reasonable:

> The concept of structural agreements, which is central to Part II of this Article, provides a direct link between transaction-cost economics and contract law doctrine. A major concern of transaction-cost economics is the manner in which various forms of governance structures can maximize the likelihood that economic transactions will be seen to completion, resulting in gains to both sides. A structural agreement is a governance structure that is designed and intended to promote the probability of gains through trade. As shown in Part II, contract law should make structural agreements enforceable to implement that design and intention. Increasingly, contract law is doing exactly that.

> The reasoning in general is this: if what the business class wants is to maximize their resources and economic theory teaches us how to do that best, then the rules of economics must be enacted as the law, even if merchants are not actually following them, for these economic rules are what the merchants would want as law if they knew of their efficiency.

We could say that the interested promise, as a cause of obligation, involves a person losing something—contracting an obligation—in order to gain some other thing—the chance that the promisee does something she wants.

A first question then becomes whether the benefit (*rectius*: chance) that the promisor gets comes from the promisee. If the answer to this question happens to be affirmative, then, *prima facie*, the interested promise is *susceptible* to juridical regulation—more specifically, we could attach a "promissory obligation" to the promise that the interested promisor makes to the promisee.

It seems to me that there is such transfer in our case. In other words, the benefit that the promisor gets seems to be a benefit that comes from the promisee.

One reason indicates this:

If the addressees of these promises are the promisees, and the beneficiaries of these promises are the promisors, then, where does the benefit come from if not from the promisee?

The justice of the case could therefore be this: The promisor must commit to the promise. If you use the promise of a reward to gain the chance that I look for your lost jewelry, I could use the chance you gained to prevent you from revoking the promise. For you cannot have gained the chance and avoid paying what it cost you—namely, the assurance that you will keep the promise or voluntary obligation.

So there seem to be an exchange or commutation in this transaction. The commutation (or reciprocity) of the interested promise seems to about a "promise" for a "chance to perform a willed transaction".

This exchange pattern can be observed in all typical interested promises: In a promise of reward for an act, the promisor assures the promisee that she will give him something if he happens to perform a certain activity, and in so promising, the promisor acquires the chance that the promisee will perform the requisite act. In a promise of a contract, the promisor assures the promisee that she will celebrate a certain contract with him, because in so promising, she acquires the chance that the promisee choose the promised option in lieu of a third option. Finally, in the fake gratuitous promise, the promisor assures a gift to the promisee, and thus obtains the chance that the promisee engages in some other sort of transaction.

So the interested promise is *hypothetically* a juridical transaction.

2. THE RECENT LAWS ON (INTERESTED) PROMISES DEFORM PRIVATE LAWS

2.1. THE CURRENT TREATMENT OF INTERESTED PROMISES

2.1.1. AN ARGUMENT AS TO THE IRELEVANCE OF MY ENQUIRY: PRIVATE LAWS HAVE ALREADY DEALT WITH THESE PROMISES

Part 1 showed that *classical* private laws provide no term with which a lawyer could demand the enforcement of an interested promise. Moreover, it ended up suggesting that private law could develop a category for such promises, given their intuitive juridical relevance. The reader could agree with my remark and yet find it irrelevant. Whether private law should contemplate these promises, and how, are unnecessary questions. The question is whether the promisor can revoke the promise in spite of the benefit that she acquired, and *contemporary* private laws provide an arsenal of tools for dealing with this question.[94]

Take the Common law decision Barry v. Davis.[95] An auctioneer tried to revoke his promise to sell a lot to the highest bidder under the argument that the only bid placed was derisory. The court found that the refusal to sell the lot amounted to a breach of a "collateral contract," to which the parties entered when the plaintiff placed the bid. The consideration thereof was found in the form of a "benefit to the auctioneer." The defendant made the promise knowing that "attendance at the sale is likely to be increased if it is known that there is no reserve." We see here a court applying the figure of a contract to enforce a typical interested promise. A lawyer could use this figure to make her own case.

Or take the French private law arrangement in Cass. Civ. 3éme, 10.5.1968.[96] A real estate broker promised to sell real estate to the plaintiff for a fixed period of time. When the plaintiff wanted to execute the option, the defendant refused to sell the land. He said he was no longer interested in selling. The court did not enforce the sale and buy-option.

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[94] A *similar* argument was made in the context of French private law. It is unnecessary to build a special theory for promises, given that other categories, especially tort and contract, could do the justificatory work. The most popular version is found in Marty et Raynaud, *Droit Civil*, T 2, Vol 1: Les obligations, Sirey, Paris, 1988, n. 355 and ss. For a critical analysis see Marie-Laure Izorche, *L'avènment de l'engagement unilateral en droit privé contemporain*, Presses universitaires d'Aix-Marseille, Aix-en-Provence, 1995, pp. 34-38.

[95] *Barry v Davies (t/a Heathcote Ball & Co)* [2000] 1 W.L.R. 1962-1969 (CA (Civ Div))

[96] http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000006977226&dateTexte

However, it entitled the plaintiff to recover the "domages-intérêts", which is the detriment he suffered owing to the revocation of the promise. We hence see the application of a second legal tool to another interested promise scenario. With this remedy, accordingly, a plaintiff could demand relief from the harsh results of an interested promise revocation.

There is still a third, more direct means of treating interested promises. The German Civil Code provides special norms that make promises obligatory from the moment of their declaration.[97] §657 and §658 deal with the promise of a reward, §661 deals with the promise of a prize for the winner of a competition and §145 serves to enforce promises of contracts. These norms say nothing about why the promise binds. The late nineteenth century legislator possibly overlooked the fact that promisors obligate themselves unilaterally in the hope of promisees doing something they want. But the idea that someone obligates herself by her promise, which is what I suggest ought to be the legal effect of an interested promise, is familiar to a student of the German Civil Code.

Now with these materials in hand the reader could say that there is no need to wonder whether and how private law should order interested promises. Postclassical private laws have already answered my question! Where practice demands the law to enforce an interested promise, the law must respond with a statute providing enforcement of the requested type of promise. Where the judge has to deal with a case for which there is no extant legal provision, he or she can invoke the figure of a contract or impose the "domages-intérêts" remedy.

2.1.2. THE THREE SOLUTIONS AND THE NEED FOR EVALUATION

Can these solutions pass without examination? Let us revise them superficially. The first two solutions utilize classical private law tools. The first utilizes the concept of contract to obligate the promisor to perform the promise. It is obvious that the operator must implement a fiction to treat the promise as a contract. This is already a reason to evaluate the figure called "collateral contract." The second solution utilizes a tort remedy to relieve the promisee of the injury caused by revocation. There is an obvious criticism of this solution: do we want to recognize promises or grant relief to the injuries of revocation? But a more pressing issue arises here. It has to do with what is left in the system once a judge treats a previously licit activity as a tort. This solution will be examined as "the reliance theory." The third solution is the "doctrine of the *obligatio ex lege*" or the idea

[97] I utilize The German Civil Code, Revised ed. as amended to January 1, 1992, Simon L. Goren translation, Rothman & Co., Colorado, 1994 and the official translation of the current text published in http://www.gesetze-im-internet.de/englisch_bgb/

that duties follow from facts because the legislator so wills it. The issue here is two-fold. On one hand, it could be that the German legislator regulated promises in a way that contradicts the demands of justice. In this case the *ex lege* obligations may answer the question of the promise's enforceability, but incorrectly. On the other hand, the *ex lege* obligations are case-by-case solutions. To each typical promise a specific legal provision. But interested promises constantly grow in diversity. Can we solve the issue of the enforceability of the interested promise with a case-by-case approach?

Each of the three following sections will be dedicated to evaluating each of the three solutions. The three sections follow the same method of exposition: Firstly, the sections present a solution in a particular context. The contract approach will appear in the context of English private law, the reliance theory in French private law and the *ex lege* obligations are described as they appear in the German Civil Code (For a justification of these choices, see 2.1.3.). Secondly, the sections abstract the solutions from the contexts where they appear to clarify their conceptual structure. This step is taken in order to see the accuracy with which the solution at stake tackles the interested promise in general. Does it cover the whole promissory phenomenon? If not, what remains outside? Are these inaccuracies significant? On the other hand, what is the nature and scope of the promissory obligation under each approach?

The three sections finish with a critical appraisal. The question is not only whether the figure, theory or norm treats the interested promise in accordance with the reciprocity that is characteristic of private law, but also whether the figure, theory or rule fits with the systematic structure it happens to be placed within, whether these pieces can cope with their task of doing justice to a promise revocation without compromising the concepts and divisions with which the private law exposes the bases of liability. To illustrate: The first solution aims to regulate the interested promises in accordance with an existing category—the contract. This theory will be satisfactory if it can provide a solution to the problem of interested promises without compromising the contract's form. The concept of contract will be compromised (or corrupted) if, after the arrangements that are necessary for accommodating the interested promise, the law of contract is no longer about what it was before—namely, enforcing agreed exchanges of rights.

2.1.3. SOME SPECIFICATIONS

In essence, this part is an analysis of legal doctrine, not a comparative law text. I have placed the three legal pieces in specific legal orders because I think that a legal piece must be analyzed in a normative context. I have chosen three legal contexts rather than one to show that three legal orders are implicated in my case. More specifically, the fact that three private laws have treated interested promises chimes with my hypothesis that the interested promise is an interesting case for private law. And I have chosen English, French and German private law as the three main contexts for obvious reasons—these are the most idiosyncratic and most influential bodies of private law.

The combination of solution and context owes its complexion to strategic reasons. I could have chosen to find the doctrine of the *obligationes ex lege* in any of the other two legal systems. As a matter of fact, both the English and French private laws have *ex lege* obligations for the enforcement of interested promises.[98] I've chosen to analyze the *ex lege* obligations in the German context because I wanted them to be incontrovertibly *in* a legal system. Both the French and the English lawyer could say that these norms do not really belong to private law. The French scholar could say that the *ex lege* obligations are exceptional extra-Code norms. The English lawyer could argue that the *ex lege* obligation is not common but statutory law. These arguments could not be made in the German context. In that context, the *ex lege* obligations are definitively in the legal system, without possible controversy.

I situate the reliance theory in the context of French private law because I did not want to analyze the contract approach in this context, while British private law does utilize the contract approach. I did not want to analyze the contract approach in the context of the French private law because it is not yet clear whether French law has endorsed the objective conception of human agency. In other words, French law sometimes engages in considerations of the subjective intention of a party at a voluntary interaction, a consideration that is absent in English private law and is more consonant with the theory of justice that my work endorses. However, I must admit, the origins of the double

[98] See 2.4.2. *in fine*.

contract analysis can be found in French scholarship,[99] and the strongest developments in reliance theory have been made in the common law world.[100]

2.2. THE "COLLATERAL CONTRACT" (AND ITS DEFORMING EFFECT)

2.2.1. BARRY VS. DAVIS

Barry saw the arrival of two new engine analyzers to Mr. Cross's auction house. On the viewing day, Barry spoke to Mr. Cross, who said that the machines would be sold at noon on 25 June "without reserve." Barry attended the auction. When it came to the engine analyzers, Mr. Cross said to those present that the machines were to be "sold that day," that each was worth £14,000, "ready to plug in and away you go." First Mr. Cross tried first to obtain a bid of £5,000. There was no bid. Then he tried £3,000; still no response. He hence asked what bids there were for the machines. Barry bid £200 for each. No other bid was made. Mr. Cross canceled the auction sale. He said to those present: "I think I am justified in not selling at an auction without reserve if I think I could get more in some other way later." Barry took the auction house to court, claiming breach of contract.

The County Court held for the plaintiff. "[T]here was a collateral contract between the auctioneer and the highest bidder, constituted by an offer by the auctioneer to sell to the highest bidder, which was accepted when the bid was made." It is "the general and reasonable expectation of persons attending at an auction sale 'without reserve' that the highest bidder would and should be entitled to the lot for which he bids." The defendant appealed: The judge was wrong in law to find that the holding of an auction without reserve amounts to a promise by the auctioneer to sell the goods to the highest bidder. And even if the judge were right, a bid cannot amount to consideration for such a promise. The bidder can withdraw his bid at any time, how could a proposal to buy constitute consideration if the proponent can revoke it? The bidder is making an "illusory promise" to do something if he feels like it.

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[99] The doctrine of "avant-contrat tacite" suggests that proposals of this type combine an offer to sell, which remains open for acceptance, and an offer to keep the option to sell open, which is deemed accepted when the offeree receives the offer to sell. The latter acceptance is assumed on the grounds that such a proposal is only beneficial to the offeree. Charles Demolombe, *Traité des contrats ou des obligations conventionnelles en general*, t. I, Hachette et Cie, Paris, 1877, n. 65, p. 64.

[100] "Many would locate the beginning of this movement in 1936 with the publication of the influential article, Fuller & Perdue, The Reliance Interest in Contract Damages (pts. 1-2), 46 Yale L. J. 52, 373 (1936-1937)." P. S. Atiyah, "Book Review: Charles Fried, Contract as Promise: A Theory of Contractual Obligation," in Harvard Law Review, Vol 95, (1981), pp. 509-528, at p. 509, note 3.

The Court of Appeal dismissed the appeal. Firstly, *Warlow v. Harrison* was authority for the proposition that in such cases a collateral contract existed between the auctioneer and the bidder. Secondly, the consideration for such a contract existed in the form of both a detriment to the bidder, since his bid could be accepted with the fall of the hammer, and a benefit to the auctioneer, because the bid could drive the bidding up. In addition, they hold, "attendance at the sale is likely to be increased if it is known that there is no reserve." As a result, the plaintiff was found entitled to "recover" the sum of £27,600, which was the difference between the bid and the machine's market price.[101]

We find in *Barry vs. Davis* an example of interested promise. Mr. Cross advertised the auction in a way that the average user of the items that were to be auctioned would find attractive. Barry was one of them. He not only created the expectations that Mr. Cross induced him to create but also relied on them. Barry attended the auction. Yet Mr. Cross did not do what he promised. He did not sell the lot to the highest bidder. Barry claimed performance and the Court found justice in his claim. How? It used the figure of a "collateral contract." But what is a collateral contract? According to the judgment, it is a "contract constituted by an offer by the auctioneer to sell to the highest bidder, which was accepted when the bid was made." But does this mean, for example, that, in the case that a third party makes a higher bid, the auctioneer is nonetheless obligated to sell the lot to the bidder with whom he made the collateral contract? The judgment does not clarify this question. We want to know more about this figure, for it seems to work with interested promises. Let us abstract the figure from the case, study it with the help of some good common law scholarship and evaluate how well it could work with interested promises.

2.2.2. THE FIGURE CALLED "COLLATERAL CONTRACT"

A "collateral contract" is a contract implicated in another contract.[102] How is such a contract formed? Within the offer of contract X, is an implied subsidiary or collateral offer

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[101] *Barry v Davies*, *cit*. For comments, see: Steve Foster, "Auctions without reserve: Warlow v. Harrison revisited," in *Cov. L.J.*, 5(2), (2000), pp. 108-113 (arguing that the fair correlate of binding the auctioneer to his promise to not revoke is to bind the auctioneer to his bid). Colin Perkin, Auctions without reserve: a rejoinder," *Cov. L.J.*, 5(2), (2000), pp. 114-116 (in disagreement with Foster, arguing—in my opinion, correctly—that the reciprocation for the obligation of the auctioneer is found in the fact that the promise will attract more public attention to the auction and eventually increase their commission.)

[102] Conf. Richard Stone, *The Modern Law of Contract*, 6th ed, Cavendish, London, 2005, at 145 "A collateral contract generally takes the form of a unilateral contract, under which one party says 'if you enter into contract X, I will promise you Y'. The consideration for the promise is the entering into contract X." For the best exposition of the collateral contract see D. O. McGovney, "Irrevocable Offers," 27, *Harv. L. Rev.*, (1914), pp. 644-663. This is the case that McGovney has in mind: 'Let us assume a concrete case: A. says to B., "I have had enough of your promises in the past and want no promise from you, but if you will put

of an obligation to not revoke the offer of contract X. The acceptance and consideration for this "collateral offer" is condensed in the fact that the offeree does something with a view to accepting the offer of contract X. When this occurs, a collateral contract is formed, which obligates the offeror to not revoke the offer of contract X.

Let me illustrate how this figure applies to interested promises. When someone makes an interested promise (the auctioneer advertises the auction with the clause "without reserve" or a person who lost something promises a reward to the public), the promisor is actually making two separate offers, rather than one promise! The first one, named "principal offer," offers an obligation (to sell the lot/to pay a reward) in consideration for a fact (whoever places the highest bid/whoever returns the lost item). This offer contemplates a classic unilateral contract. The offer of an obligation becomes an obligation when the offeree performs the requisite act, which constitutes the acceptance of the offer. The second or 'collateral' offer also contemplates a unilateral contract, but of a more abstract nature: this is a unilateral contract that obligates one to make another unilateral contract. The offeror offers to not revoke the principal offer (to sell the lot to the highest bidder, to pay the reward to whoever returned the lost thing) in consideration for the fact that the offeree does something with a view to accepting the principal offer (place a bid/begin to search for the lost item). This act constitutes the acceptance of the collateral offer. When the offeree begins to perform the acceptance of the principal offer or accepts the collateral offer, the collateral contract is formed. By this contract, the offeror loses her ability to revoke the principal offer (cancel the auction or revoke the promise of a reward) and the offeree consequently accrues the right to fully accept the principal offer (if his bid is the highest, then win the bidding process, or ignore the revocation and continue searching for the lost item).

This approach copes with some of the typical issues arising where legal operators try to apply the standard offer and acceptance scheme to interested promises. First of all, the acceptor of the collateral contract is not obligated to complete the performance required in the principal offer. (The bidder can revoke the bid before the auctioneer declares it highest; the person who embarks on a search for the lost thing has no duty to continue searching.) This is so because the thing that the acceptor pays in consideration for her right to complete the performance is not an obligation but an act that she has already done (placed a bid or begun to search the lost thing). Secondly, third parties could also acquire a right to accept the principal offer. They need only accept the collateral offer (place a

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my sugar-house machinery in good repair I will pay you $100 for the job, and if you will begin immediately I will give you a reasonable time to complete the work."' *Idem*, p. 659.

higher bid or search for the lost item). This does not imply that every acceptor of the collateral offer has a right to the thing offered in the principal offer. The person who would acquire the right to the obligation offered in the principal offer (the right to the auctioned lot or to claim the reward) is the person who accepts the principal offer (the one who won the bidding process or returned the lost item to the owner).

It is important to notice however that in the double contractual approach, the promisor is not obligated from the moment that the promisee receives the promise. The promisee must have commenced the performance of the requested act—accepted the collateral offer. This requirement could be practically insignificant. In the majority of cases it will be easy for a plaintiff to argue that he had begun performing before the revocation. Especially since, in English private law, the acceptance of a unilateral contract is a non-receptive act; it took place even where the acceptee-offeror ignored it.[103]

The double contract approach is quite an effective tool. With the insignificant compromise of having to begin her part in the promised transaction, the promisee can deem herself entitled to demand the promisor not neglect the promise. However, the problem with the contract approach is not so much its effectiveness in dealing with interested promises. The problem is rather that it becomes part of contract law.

2.2.3. The collateral contract's deforming effect, or on how implied terms deform contract law

2.2.3.1. The form of contract law: agreed exchange of rights

The point of contract law is to enable private actors to exchange their present or future assets *in the manner that they so desire*.[104] It is by attending to this desideratum that private law developed the concept of contract. The offer is the proposal whereby the first person determines the terms of the intended exchange. The acceptance is the act whereby the second person agrees to the terms of the offered exchange. The voluntary obligation and consideration are the terms or elements of the exchange. Through the voluntary

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[103] "…and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification." Judge Bowen in *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256. Conf. G.H. Treitel, *The Law of Contract*, 7th ed., Stevens, London, 1987, p. 31. I would have loved to use the Smoke Ball case in this section. But none of the judges use the name "collateral contract" to elaborate their decisions, even though I think they applied that figure.

[104] Two sources inspire this title: Peter Benson, "The Unity of Contract Law," in Benson, Peter (ed.), *The Theory of Contract Law: New Essays*, Cambridge University Press, Cambridge and New York, 2001, pp. 118-205 and Maurice Wormser, "The True Conception of Unilateral Contracts," in *The Yale Law Journal*, Vol 26, No 2, (Dec, 1916), pp. 136-142.

obligation a person obligates a future performance at the request of the other person, while through the consideration the creditor of the obligation commits to another performance of her own or performs a certain act, like a transfer or a deed.

The unilateral contract is, like all contracts, a prefabricated mode in which persons can effectuate exchanges. In an offer of a unilateral contract, the offered obligation becomes an obligation of the offeror to the offeree when the offeree performs the act requested in the offer. Until the offeree fully performs the requested consideration, the offeror does not acquire the thing she wants as an exchange for her obligation, and so, the offeree does not acquire a right to the offeror's performance; for the contractual exchange has not occurred.

2.2.3.2. THE DIFFERENCES BETWEEN CONTRACT AND INTERESTED PROMISE

The social practice of contractual exchange has much in common with the social practice of making interested promises. Nevertheless, there are some remarkable differences. As we saw in 1.2.3.1., the promise of interested promise cannot be reduced to the offer of contract. The promisor is not asking the promisee to promise her something or perform an act as consideration for her promise. She is making him a promise. There is also little in common between taking an interested promise and accepting a contractual offer. The acceptance of a contractual offer is not only the externalization of the will to be the creditor of the contractual obligation, but also, and even more importantly, it is the performance of the act by which one transfers the thing requested in exchange for the contractual obligation; acceptance is undertaking the correlative obligation, transfer or deed.[105]

Finally, the thing that the interested promisor gains in an interested promise has little to do with the thing that the offeror gains in a contract. The consideration for a contractual obligation can, by definition, take the form of a reciprocal contractual obligation or the performance of a certain deed. It is either the obligation I have as against you to do, give, or not do a certain thing, or the act whereby I give a certain thing to you, or perform a certain deed. The reciprocity that I find latent in the interested promise is of a different nature. It consists in a chance, the probable but uncertain eventuality that someone does something. In contrast with deeds, it has no visible manifestation, and in contrast with obligations, it requires no *volition* by the promisee (I fully elaborate the nature of chance in 5.4.).

[105] See more in 5.3.3.

2.2.3.3. BARRY V. DAVIS IS A GOOD EXAMPLE OF AN INTERESTED PROMISE

Barry v. Davis undoubtedly deals with a promissory advertisement. The auctioneer promised Barry that he would auction a certain lot on a certain day and that this lot would be sold to the highest bidder. Why did he do that? He did it because he thought that the assurance provided by such a promise would encourage Barry, as it would encourage anyone in his position, to participate in the bidding. The greater the public participation in the bidding process, the better his chance of selling the lot well. [106]

Both the County Court and the Court of Appeal saw the advertisement as an interested promise. The County Court noted the promissory nature of Mr. Cross' declaration when it said: "[I]t would be the general and reasonable expectation of persons attending at an auction sale 'without reserve' that the highest bidder would and should be entitled to the lot for which he bids."[107] The appeal court saw that this promise produces a benefit for the promisor when it said: "[A]ttendance at the sale is likely to be increased if it is known that there is no reserve."[108] In other words, the auctioneer advertises the auction with the clause 'without reserve' in order to improve the chance that more people will attend the sale.

Hence the judge and the Court of Appeal could see the injustice of the defendant's deed. If the auctioneer advertises the auction with the clause 'without reserve' then it is "fair and logical"[109] that the auctioneer should sell the lot to the highest bidder. So they decided to rectify the injustice caused by the defendant's refusal to sell the lot. How did they do justice after the non-performance of the promise?

2.2.3.4. YET THE COURTS TREATED THE INTERESTED PROMISE AS A CONTRACT

The court did justice to the non-performance of the promise through the law of contract. In advertising the auction with the clause 'without reserve', the auctioneer is making an offer of an obligation to sell the lot in consideration for the offeree placing the highest bid. A successful bid accordingly constitutes acceptance and consideration for the obligation to sell the lot. According to the judge, the defendant-auctioneer breached a contract when

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[106] Conf. Colin Perkin, *op. cit.*, p. 116: "As with other unilateral agreements, there is absence of mutuality of obligation, but auctioneers are not obliged to advertise the sale of property 'without reserve', which is a deliberate and commercial decision, perhaps made upon their advice to the seller, with the purpose of encouraging bidding and increasing their commission."

[107] Barry v Davies, cit., p. 1964, D.

[108] *Idem*, p. 1967, H.

[109] *Idem*, p. 1964, E.

she withdrew the lot after the plaintiff had placed his bid. On what grounds did the auctioneer make herself liable? [110] On the grounds that:

> There was a collateral contract between the auctioneer and the highest bidder constituted by an offer by the auctioneer to sell to the highest bidder which was accepted when the bid was made.[111]
>
> As to consideration, in my judgment there is consideration both in the form of detriment to the bidder, since his bid can be accepted unless and until it is withdrawn, and benefit to the auctioneer as the bidding is driven up.[112]

2.2.3.5. WHAT DID THEY HAVE TO DO TO TREAT THE INTERESTED PROMISE AS A CONTRACT?

Collateral contract? Offer? Acceptance? Consideration? In order to make the defendant liable for breach of contract, the judges had to imply a *collateral offer* of a unilateral contract in the principal offer and, more remarkably, the judge had to invent a new conception of acceptance of a unilateral contract. They found that beginning to perform the act required by the principal offer amounted to *acceptance* of the collateral offer. The defendant advanced a very good argument against consideration in such an implied contract. Bidding could never be an actual benefit for the auctioneer, for the bid is but an offer, and offers can be revoked. In other words, the bidder can revoke the alleged consideration. This, they argued, amounts to a discretionary promise, a promise the performance of which depends on the promisor—an illusory consideration.[113] Since the appeal court could found reason to support the argument of the defendant, the Appeal introduced the new conception of *consideration* for a unilateral contract. The Court said: "Moreover, attendance at the sale is likely to be increased if it is known that there is no reserve".[114]

Justice was thus served, but, as I will now show, at the risk of jeopardizing the idea of contract law.

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[110] One would expect the court to have argued something like, in cases where the performance of the activity requested in the offer of a unilateral contract depends on some kind of collaboration by the offeror (winning the bid depends on the auctioneer letting the hammer fall), the offeror must act in good faith and do whatever is required so that the offeree could perform the requested activity. Since there was no higher bid than the plaintiff's, the defendant should have exacted the bidding process or declared the plaintiff as the winner of bid. But this was not the *ratio decidendi*.

[111] Barry v Davies, cit., p. 1964, E.

[112] *Idem*, p. 1967, H.

[113] *Idem*, p. 1965, A-C.

[114] *Idem*, p. 1967 H.

2.2.3.6. Deforming contract law, or the effect of implying acceptance and consideration

After having enforced the interested promise with the figure of the collateral contract, the court incorporated new versions of acceptance and consideration.

Now, acceptance of a unilateral contract in English contract law not only means that the offeree of a unilateral contract performs the act required in the offer. It also means that the offeree begins to perform the act required in the offer.

Now, consideration for the obligation of a unilateral contract in English contract law not only means the act that the debtor of the obligation wants in exchange for the obligation, it also means an increased likelihood that such act takes place.[115]

In themselves, these new versions of acceptance and consideration are not undesirable. They help us to deliver justice in the case of non-performance of an *interested promise*. Combined with the *Barry v. Davis* implied offer of a unilateral contract (*rectius*: with an interested promise), these elements help us to articulate a just decision—since the promisor benefitted from the chance she sought, it is unfair that the promisor neglects the promise. But these new versions of acceptance and consideration are undesirable in the law of *contract*. For, considered in connection with their natural correlate (namely: with the proper understanding of an offer of a unilateral contract) these new conceptions of acceptance and consideration serve to articulate legally correct (but) unjust judgments.

Think of the following hypothesis. A declares to B that A will pay a sum to B if B performs a certain act. A is clear with B that A wants to be obligated to give the sum to B *if and only if* B performs the requested act. In other words, A makes an offer of a unilateral contract to B. A is making an offer of a unilateral contract because A wants to reserve to herself the power to change her mind, to revoke the offer, until B fully completes the act that she wants. B is well aware of this. For some reason B finds the proposal convenient and, willing to run the risk of revocation, begins to perform. Now A revokes the offer before B completes the performance. Unhappy with A's decision, B demands recompense from A for breach of contract. To do this he says: First, A's offer was an offer contemplating a unilateral contract. Second, this offer was accepted. I accepted this offer when I commenced to perform the requisite act (B quotes *Barry v. Davis*). Finally, the acceptance

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[115] Conf. Neil Andrews, *Contract Law*, Cambridge University Press, Cambridge, 2011, n. 3.47, p. 71: "The 'implied collateral' obligation is a juristic tool deployed to achieve a contractual solution in pre-contractual contexts, where the justice of the case demands. Indeed, [one can see] the court's willingness to construct an implied collateral obligation and, in support of this, the courts' strategic finding of 'consideration'."

of this offer was backed with consideration, for immediately after I was communicated the offer, I made it more likely that A would get what she wanted (B quotes *Barry v. Davis*).

In my opinion, B has a case as against A. The judge may easily miss the fact that, in *Barry v. Davis*, the "offer of a unilateral contract" was actually an interested promise. Namely, a proposal that is so firm and so convincing that it gives reasons to its addressee to take it as a right, a fact that increases the likelihood that he decides to act as the promisor desires. To an English judge, *Barry v. Davis* was about an offer of a unilateral contract. So was A's offer to B. Now, as the beginning of the performance amounts to acceptance and the hearing of an offer augments the likelihood that the offeror gets what she wants, then B, who did all of this, has a case against A.

I think this case is legally correct. Judges are expected to read rules in accordance with their systematic intelligibility. In other words, in law, an offer must be understood in its connection with the concepts of acceptance and consideration. And this feature of sophisticated legal systems implies the banishment of the rule's factual bases. In other words, in law, this offer or that offer are both equally an offer. This is why Barry's conception of acceptance and consideration can be used in disregard of Barry's factual bases. As Lord MacMillan puts it, "The danger attendant on all doctrines which are found on presumptions, implications or fictions originally thought to be equitable is that they are apt to be extended by a process of logical development which loses sight of their origin and carries them far beyond the reach of any such justification as they may have originally possessed".[116]

2.2.3.7. To finish where we started: Contract law is no longer about agreed-upon exchange of rights

Now, a common law private law can enforce an offer before acceptance by means of the new conceptions of acceptance and consideration. A person who wanted to be obligated if and only if the offeree fully performs the act requested in the offer could find herself stopped from using of her power of revocation. Contract law is no longer the means by which private actors exchange their present or future assets in the manner they most desire. Barry v. Davis has corrupted it.

The theoretical implications of *Barry v. Davis* have been rendered in soft law in the two major common law private laws.

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[116] In *Radcliffe*, AC 215, p. 235. Quoted in Pierre J.J. Oliver, *Legal Fictions in Practice and Legal Science*, Rotterdam University Press, Rotterdam, 1975, p. 88.

Goff LJ stated obiter on the issue of revocation of a unilateral offer:

> Whilst I think the true view of a unilateral contract must in general be that the offeror is entitled to require full performance of the condition which he has imposed and short of that he is not bound, that must be subject to one important qualification, which stems from the fact that there must be an implied obligation on the part of the offeror not to prevent the condition becoming satisfied, which obligation it seems to me must arise as soon as the offeree starts to perform. Until then the offeror can revoke the whole thing, but once the offeree has embarked on performance it is too late for the offeror to revoke his offer.[117]

And Section 45 of the Restatement [Second] of the Law of Contracts stated:

> (1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.
>
> (2) The offeror´s duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.[118]

2.3. THE RELIANCE ARRANGMENT (AND ITS DEFORMING EFFECT)

2.3.1. CASS. CIV. 3ÉME, 10.5.1968

In "Immobiliere Rivera Holliday," the defendant conceded an exclusive right to sell one of its properties to "Y," a real estate agent. "Y" in turn granted an option to buy the defendant's property to "X," the plaintiff. This option gave "X" the right to buy the property until 15 December 1963. "X" gave notice to "Y" of his eventual use of the option and later, by letter dated on 27 November, requested that the defendant contact a notary with a view to effectuating the sale option granted by "Y." On 3 December the defendant sent a letter to "Y" letting him know that such a sale could not be executed as he was using his

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[117] *Daulia Ltd v Four Millbank Nominees Ltd*, (Goff LJ), [1978] 2 ALL ER, p. 561. This case follows *Errington v. Errington & Woods*, where a father promised his son and daughter-in-law he would transfer ownership of a house if they paid off the remaining mortgage installments. "The father's promise was a unilateral contract [which] could not be revoked by him once the couple entered on performance of the act, but it would cease to bind him if they left it incomplete and unperformed…" Denning LJ [1952] 1 KB 290, P. 295, CA. A commentator cited this case to "suggest that the offeree is protected whenever he starts to perform, as stipulated in the offer." Neil Andrews, *Contract law*, *op. cit.*, n. 3.43, p. 68. However, the author says that "whether commencement of performance should *always* have the effect of fettering the offeror" depends on the context of the case, this view being held in *Luxor (Estbourn) Ltd. V. Cooper*, (1941) [1941] AC 108, HL. *Idem*, n. 3.40, p. 66 and n. 3.45, pp. 69-70.

[118] In http://www.lexinter.net/LOTWVers4/restatement_(second)_of_contracts.htm (29-1-2016)

"freedom of disposition" to revoke "Y"'s agency. "X" had notice of this fact and claimed damages from "Immobiliere Rivera Holliday".

The Court of Appeal ordered "Immobiliere Rivera Holliday" to pay the sum of 15000 FRANCS to "X", under the heading of "domages-intérêts". The basis for this judgment was that Immobiliere had caused a prejudice to X by refusing to act in accordance with a "proposition of sale" that "X" had accepted. Immobiliere appealed the judgment to the Court of Cassation arguing that Immobiliere revoked the proposal in question before that "X" accepted it. So, if any pre-contractual dealings (*pourparlers*) had existed between the parties, these dealings did not amount to an agreement. The Court of Cassation dismissed the appeal. The main ground was this:

> Notwithstanding that an offer of sale can in principle be revoked as long as it is not accepted, it is another case where the one from whom it emanated expressly bound himself to not revoke the offer before a certain date [119]

French jurists treat this arrangement as one that establishes the principle that an offeror who has fixed a delay to accept the offer incurs an "obligation" to maintain the offer.[120] Opinion is divided as to the nature and bases of the offeror's liability.[121] The Court says nothing of relevance to such questions. If we judge from the remedy and the accounted facts however, we have grounds to conclude that the arrangement applies what Anglo-American jurists call "reliance theory."

The Court gave force to an unaccepted offer and granted the recovery of the lost expenditures because, in my view, the Court found it reasonable that the plaintiff relied on the proposition of sale. This characterization is supported by the interpretation of legal comparatist Basil Markesinis, who, comparing the German private law on the one hand, and French and English on the other, sees that "unlike the latter which treats such a

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[119] "MAIS ATTENDU QUE SI UNE OFFRE DE VENTE PEUT EN PRINCIPE ETRE RETRACTEE TANT QU'ELLE N'A PAS ETE ACCEPTEE, IL EN EST AUTREMENT AU CAS OU CELUI DE QUI ELLE EMANE S'EST EXPRESSEMENT ENGAGE A NE PAS LA RETIRER AVANT UNE CERTAINE EPOQUE" http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000006977226&dateTexte

[120] Jacques Flour, Aubert, Jean-Luc and Sauxes, Éric, *Droit Civil, Les obligations, t. 1: L'acte juridique*, 13d ed., Sirey, Paris, 2008, p. 109.

[121] The dominant opinion is that the court manifestly implements the theory of the unilateral engagement. "An offer, valid till 15 December 1963, accepted expressly in 24 October of the same year (with confirmation of 27 November), cannot be revoked in 3 December, not because it was accepted, but because it must have been maintained till 15 December." Izorche, *L'evènment de l'engagement unilateréral en doit privé contemporain*, *op. cit.*, n. 156, p. 117. However, the criticism is made that if the court recognized an engagement by unilateral will why did it sanction the non-performance of the promise with the "domages-intérêts?" Jacques Flour, Aubert, Jean-Luc and Sauxes, Éric, *Droit Civil…*, *op. cit.,* , p. 109 note 3.

premature revocation as being without effect, the former systems (*American "Restatement (Second) Contracts*, para 90(1); France, [our case] Cass. Civ. 3éme, 10 mai 1968, Bull civ, III, no 209) regard such a revocation as effective, but require the offeror to pay to the disappointed offeree damages equal to his 'reliance interest:' ie, damages that will restore him to the position he was in before the offer was made."[122]

2.3.2. THE RELIANCE THEORY

The reliance theory aims to be a source of obligation. Three conditions must be in place for the formation of a reliance obligation.[123] First, a person does or says something suggesting that she intends to follow a certain course of conduct. In our case, "Immobiliere," represented by "Y," stated to "X" that "X" had a right to buy one of its immovable goods until 15 December. Second, a reasonable person develops the expectation that the suggested course of conduct will be followed. "X," acting as the average individual who receives a firm proposition of sale, acted on the idea that he could prepare himself for the sale. Finally, the person with the expectations relies upon the expectations, incurring reasonable expenditures. I imagine, for French case law is typically frugal with facts, that "X" did something with a view to buying the property, like rejecting a comparable offer or taking a loan to buy the property, something that could have cost him 15000 FRANCS. Anyone in "X's" position would reject a less convenient offer but no reasonable person would, for example, gamble her liquid assets with a view to obtaining the money for the property. Now, if these elements are verified and the expectation-inducing person contradicts her suggested course of conduct, the reliant-person can claim the "reliance interest". According to this claim, the defendant must return the plaintiff to the position he would be in had he never relied upon the defendant's conduct.

How well does the reliance theory tackle the issues emerging in interested promise scenarios? I can elaborate two possible answers, the first rigorous and unfavourable, the second generous and favourable.

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[122] Basil Markesinis *et al.*, *The German Law of Contract: a comparative treatise*, 2d ed., Hart Publishing, Oxford and Portland, 2006, at 65.

[123] I draw from Hugh Collins, *The law of contract*, 2d ed., Butterworths, London, 1993, p. 69.

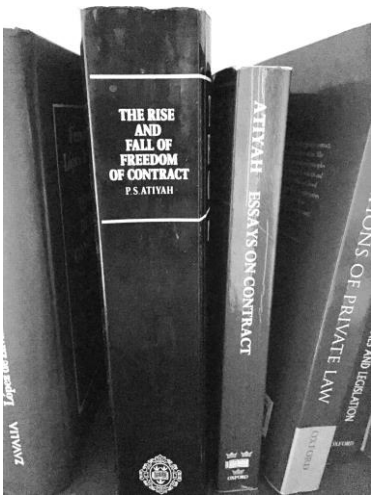
The idea that we are responsible for the detriments that a person suffered in virtue of having reasonably relied on the idea that we made her have by promising her something or suggesting that we will do or continue doing something appeared in different doctrines or principles. James Gordley (in Foundations of Private Law, at p. 290) traces the idea back to the Dominican theologian Cajetan (in picture 1, receiving Martin Luther, available at https://it.wikipedia.org/wiki/Tommaso_De_Vio) to whom a "promisee was owed nothing as a matter of justice unless he had suffered damage because the promise was first made and then broken." (Quoted in Gordley, Philosophical Origins, at p. 73). The idea reappears in an influential article by Rudolf von Jhering (picture 2 in https://es.wikipedia.org/wiki/Rudolf_von_Ihering), where it becomes the doctrine of *culpa in contrahendo*, which was received by the provisions of many twentieth century civil codes.

Picture 1: Cajetan (Tommaso De Vio) receiving Martin Luther

Picture 2: Rudolf von Ihering

In the common law world, the idea was made famous in an article called "The Reliance Interest in Contract Damages", by Lon Fuller (picture 3 in http://www.lonlfuller.org) and his pupil William Perdue (there is discussion on whether it was indeed the master who wrote it). Patrick Atiyah, author of the monumental *The Rise and Fall of Freedom of Contract* (in the last picture, from my own library), argued that liability would be better understood if the category "contract" were replaced for the what he called "benefit based liability", "reliance-based liability" and "wholly executory" contract or promise. In his view the first two are "the paradigm cases of obligation", while the third, if not "a projection of liabilities normally based on benefit or reliance", is, "by the standard of modern values, very weak compared with the grounds for the creation of benefit-based and reliance-based obligations." Op. Cit., pp. 1-7, especially at 4.

Picture 3: Lon Fuller



Picture 4: Atiyah's Books

The favourable thesis would say that the reliance theory could be very useful to relieve a promisee of the harsh results that he could suffer where the promisor unduly revokes the promise. [124]

The unfavourable thesis would hold that the reliance theory treats the promise as something that it is not. Under the reliance doctrine, a promise is a risk-creating act. When someone receives a promise, someone is being put in a situation of risk—that one acts in reliance to the promised fact that the promisor later never happens to perform. But, as Charles Fried remarked, a promise is not like a pit that the promisor dug in the road.[125] A promise is a right conferral act. If the law is to deal with promises, the law must treat them as what they are. The natural remedy for breach of an interested promise cannot be the reliance damage, whatever the extention of it may be. The remedy, if at all, must be the value of the expectations created with the promise.

Now, even if we concede the point to the favorable opinion, and say that the theory adequately deals with the exigencies of promise making, I would not use this doctrine to regulate interested promises. This is because using the theory for this purpose leaves it in the realm of private law. The problem with positing the reliance theory in private law is that the theory debunks a fundamental division. Namely, the division between the deeds that engage one person to another in an obligation and the deeds that one can do without the others' reproach.

2.3.3. The reliance arrangement's deforming effect, or how reliance arrangments blur the freedom/obligation divide

2.3.3.1. One message in art 1370: on the one hand, obligations, on the other hand, freedom

The French private law, as stated in its most important sources, adheres to a tradition of classifying the obligations in accordance with their causes. The French Civil Code divides the obligations into two main branches, those arising from a contract and those arising

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[124] True, the reliance theory does not grant the promisee the "expectation interest;" namely, an action for compensation of the frustrated expectations. However, it seems that courts have no better means to quantify the reliance damage than the value of the thing promised. (Daniel Farber and Matheson, John, "Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake", in *The University of Chicago Law Review*, Vol. 52, No. 4, (Autumn, 1985), pp. 903-947.) In other words, the reliance damage could be granted to put the promisee in the situation he would have been in had the promise been performed.

[125] For the reliance theory a breach of a promise "is like a pit I have dug in the road, into which you fall. I have harmed you and should make you whole." Charles Fried, Contract as Promise: A Theory of Contractual Obligation, Harvard University Press, Cambridge (Mass) and London (Eng), 1981, p. 10.

from the other categories or situations to which the Code attaches an obligation (Art. 1370). These other categories or situations are what the French call *"sources de la responsabilite extra-contractuel."* The difference between the contract, on the one hand, and the other categories or situations like the quasi-contract, delict and quasi-delict on the other hand, is that only the contract category enables parties to voluntarily impose obligations on each other.

There is another message latent in this classification. The Code makes it plain that persons incur no obligations if, in interacting with one another, they neither celebrate a contract, nor effectuate an illicit or licit but unjust interaction. The point is, in French legal terms, to separate the acts that engage persons in obligations from the range of simply licit interaction.

2.3.3.2. WHAT THE RELIANCE DOCTRINE DOES, AND THE CODE CIVIL ALSO DOES

To be sure, the reliance theory proffers solutions that the Code's categories already satisfy. As stated earlier, the reliance theory would impose an obligation on a person whose inconsistent conduct induced another to act in a manner detrimental to his interests. If the inconsistency on which the plaintiff relied amounts to an impingement on the plaintiff's rights, then the interaction qualifies as *illicit* and the Code, as the reliance doctrine, obligates the defendant to pay the damages suffered by the plaintiff. These are cases of deceit (Art. 1382) and bad faith in contractual dealings.[126] If the defendant gained something out of the reliant-party's detriment, then the interaction amounts to an *unjust* enrichment and the Code, (with certain limitations) like the reliance doctrine, obligates the defendant to make restitution of the accrued value to the plaintiff. These are the cases of *negotiorum gestio* (1372 and related articles) and *indebitum* (1377 and related articles).

2.3.3.3. WHAT THE DOCTRINE DOES BUT THE CODE DOES NOT

What the reliance theory demands but the Code resists is relief for injuries that arise in cases of simply licit and not unjust interactions, like, paradigmatically, the detriment one party may suffer through the other's unforeseen breach of a contractual negotiation. These interactions are simply licit in that someone acts without infringing someone else's

[126] French jurists have long argued that there is a duty to act with prudence and diligence when entering into contractual negotiations. A. Colin et Capitant, H., *Cours élémentaires de droit civil*, t. II, 9th ed, Dalloz, Paris, 1942, p. 220. See the jurisprudence quoted in Jeremy Antippas, "De la bonne foi précontractuelle comme fondement de l'obligation de maintien de l'offre durant le délai indiqué," in *Revue Trimestrielle de Droit Civil*, No 1, 2013, p. 27-45, at n. 11, note 94.

rights and not unjust in that, albeit someone may lose something due to another's contradictory conduct, the loss of the one cannot be imputed to the other as a gain.

In the system of the Code Civil, such injuries are imputed to the sufferer's own act, they are comparable to a person's misuse of her own thing. Once again, if the injury arose out of another's wrongful conduct, as when one breaches her duty to deal with others in good faith, then the damaged party can argue that the defendant was negligent or negotiated in bad faith or committed a fraud. But then the conduct was *illicit*. Or if someone happens to gain something out of a licit and not contractual interaction, as when the plaintiff gave him something by mistake, then the plaintiff has a claim on restitution. But then the interaction falls in one of the Code's articles on *unjust* enrichment.

However the doctrine wants to grant another value to these losses. How will it do this? By neglecting a part of the system where it aims to situate itself, as evinced in Cass. Civ. 3éme, 10.5.1968.

2.3.3.4. What the Court of Cassation had to do to satisfy the doctrine's demand

The defendant was entitled to recover the "domages-intérêts" from the plaintiff. On what factual basis did the Court hold the parties to such an obligation? The court affirmed that this was because the defendant revoked the offer. On what legal ground is such behaviour liable? The court chose to say "Notwithstanding that an offer of sale can in principle be revoked as long as it is not accepted, it is another case where the one from whom it emanated expressly bound himself to not revoke the offer before a certain date." Akin to a faithful reliance theorist, the court debunked the contract formation process. To the court, an offer may cause an obligation even without acceptance. The court neglected the role of acceptance in the process of transforming a licit interaction into an obligatory relation.

Thus, the reliance doctrine enters into French private law. It does so as an alternative to the contract. Contract is no longer the only means by which persons can transform their licit interaction into a juridical relationship. If a person acts in a reliable way, which another person relies upon, the reliance is detrimental to the latter, and the former deviates her conduct from the expected course, then the latter has an action for the recovery of the "domages-intérêts" as against the former. The plaintiff can demand the defendant place him in the situation he was before the reliance-creating act. This is a way of recognizing obligations in licit interactions. But in my opinion, this is an unjust cause of obligations.

2.3.3.5. THE UNJUSTNESS OF THE ARRANGEMENT

To be sure, one has legal grounds to say that acceptance is unnecessary for certain contracts. After all, when Art. 1108 mentions the four essential conditions for the validity of a convention, in relation to consent it requires: "The consent of the party who obligates himself."[127] One can say that the consent of the offeree is not necessary for the creation of a voluntary obligation. But one cannot dispense with the concept of acceptance without further elaboration. For there is also the venerable wording of art. 1131, which says: "An obligation without a causa, or with a false causa, or with an illicit causa, cannot have any effect." Art. 1131 mandates justice in voluntary transactions. Causa means that, in the transaction, I gave something for the obligation that you assumed. After doing away with the concept of acceptance, the court must have considered reciprocity in relation to the obligation of the offeror. As one commentator has asked, "Quelle est la cause de <<cet engagement autonome>>?[128]

The pertinent question is this, why should the offeror be obligated to the offeree if the offeror gained nothing in his interaction with the offeree?

There is a reason why the only one responsible for misuse of property in licit pre-contractual dealings is the owner of the lost property himself. This reason is that no one can be said to have gained what the other lost. Had my negotiation been illicit, say by pretending we are reaching an agreement so that you close no contract with my competitor, I could compensate you for lost opportunities. Here however, as in any illicit interaction, your lost profit is also my gain. Even if no tangible thing passed into my possessions, I frustrated a contract between you and my competitor. To you this was a loss, to me it was a gain, and my gain caused you a wrong, for I obtained it by deceiving you. This interaction, which looks licit, is in actuality illicit.

Alternatively, I promise you that if you build a wall in my house I will pay you X sum. Before you complete the work, I revoke the offer. Here you have a claim on me for restitution.[129] Even if the only possible acceptance of my offer was your building of my wall—and, in this sense, I could licitly revoke my offer, for there was no binding contract—you can still have a claim for restitution. You have a right against me because

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[127] This argument is made by Rodolfo Sacco, "Formation of Contracts," in Vv. Aa., *Towards a European Civil Code*, Kluwer Law International, The Hague, 2004, Chapter 19, pp. 353-362.

[128] Commenting on a case of cession of creances: Augustin Boujeka, "De l'art de constater un engagement unilateral sans en tirer les consequences juridiques," in *Recueil Dalloz*, (2004), p. 1969-1970, at n. 5.

[129] I acknowledge that the case may have a different interpretation in the light of the French Civil Code.

your acts benefited me. You can recover your misspent expenditures because after your detriment I am better off in the same measure that you are worse off. The interaction, albeit licit, amounts to an unjust result. The point is that we must elaborate when doing justice in rare cases!

2.3.3.6. To finish from we started: The blurred division of the obligations

The reliance theory may allow promisees to demand relief from the injury suffered as a result of the promisor's undue breach of promise. But it does that without reference to the gain that the promisor got by the undue breach of the promise. In other words, the reliance theory is not concerned with the question of justice. The basis for imposing an obligation is the simple fact that someone caused another to act in detriment to himself. But then almost literally every expectation producing conduct could mature into a cause of obligation, from breach of contractual negotiations, to not fulfilling a promise of dinner, to unexpectedly quitting a relationship. To persons in private law it becomes quite difficult to ascertain which conduct would place them in an obligation. Hence, inserted in private law the reliance theory and its demands blur the just division between freedom and obligations.

Does my conclusion imply that we should pay no attention to the realm of the licit life of persons? No, it does not. This realm is the field of innovation. There is where private actors, through the licit use of their freedom, create new forms of things, associations and interactions. The jurist must look closely to these new forms since some of them may come with juridical implications. In this connection, the reliance theory and its case law is important for the jurist. It shows us sensible episodes of contemporary life. I am convinced that innovation must be made in the law of delicts. Perhaps the jurist should reconsider the classification of the person's rights. My PhD attempts to innovate the law of voluntary transactions. From a classical private law perspective, the interested promise has no obligatory implications; it is a licit and not unjust interaction. I believe that the promise ought to obligate the promisor, but not only because the promisor may cause another to rely on the promise, but also because the promisee could rely on the promise and this possibility constitutes a benefit for the promisor. I point out the cause or justice of the promisor's obligation. If I manage to sufficiently depict the conditions under which such possibility is a benefit for the promisor, we will then have a model of a just cause of obligations. What we used to see as a simple interaction—or a revocable offer—in fact we see as a voluntary transaction. I am sure that the new cause of obligation will deal with the injustice of Immobiliere without blurring the divide between duty and freedom.

2.4. THE *OBLIGATIONES EX LEGE* (AND THEIR INHERENT RISK)

2.4.1. BGB §657, AND SIMILAR PARAGRAPHS

§657 of the German Civil Code (BGB) prescribes: "A person, who by public notice announces a reward for the performance of an act, in particular for the production of a result, is bound to pay the reward to any person who has performed the act, even if he did not act with a view to the reward". §657 (2) establishes that "Revocability may be waived in the promise of a reward" and that "in cases of doubt, a waiver may be seen in the setting of a period of time for undertaking the act."

In this way, the main source of German private law makes a promise of a reward obligatory from the moment of its declaration. BGB provides comparable solutions to typical interested promises in other sections: §661 deals with the promises of a prize for the winner of a competition, §661 deals with promissory advertisements, §780 with promises to perform an obligation and §781 with cases where someone acknowledges a debt by promise.

2.4.2. THE DOCTRINE OF THE *OBLIGATIO EX LEGE*

In my interpretation, the means by which the German legislator introduced these causes of obligations into its law of obligations adhere to what professor Mayer-Maly called "the doctrine of *obligatio ex lege*".[130]

The doctrine of *obligatio ex lege* is a mode of justifying obligations. According to this doctrine, a given circumstance gives rise to an obligation when a validly enacted norm has attached an obligation to the given circumstance. The answer to the question "why does X obligation follow from Y circumstance?" is "X obligation follows from Y circumstance because the law says it."[131] This is a very flexible mode of justifying obligations. Such is its

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[130] Theo Mayer-Maly, "Divisio Obligationum," in *The Irish Jurist*, Dublin, (1966\1967), pp. 375-385, at p. 383.

[131] The doctrine of the *obligatio ex lege* or, better, of the *lex* qua supreme source of *Ius* is, with its related item of the "legal certainty", the presupposition of the State private law.

> Con la moderna "certezza del diritto" siamo immersi, dunque, ben all'interno di una ampia serie di arnesi mitologici di cui la modernità giuridica è straordinariamente doviziosa.
>
> Il primo è lo Stato quale unico produttore di diritto, al quale consegue, dapprima, il mito della legge quale unica fonte capace di esprimere la volontà generale e, quindi, quello della sua intrinseca giustizia e della indiscutibile infallibilità del legislatore.
>
> Il secondo è che la produzione del diritto ha termine con la promulgazione del testo contenente la volontà del legislatore quale unico produttore, con la rilevantissima conseguenza (rilevantissima precisamente per costui) che l'attività intellettuale di ogni interprete (e soprattutto del giudice) si riduce (non può non ridursi)

explanatory power that a valid norm could link an obligation to almost every imaginable circumstance.

Ex lege obligations could be seen also as a legislative technique. As such, ex lege obligations are propositions that establish causes of obligation in the form of conditionals. "If Y happens then X must be the case." This technique requires elaboration of two basic premises: the "situational case" and the "legal effect." The situational case is the factual basis of the obligation. It is a description of a possible state of affairs. Every possible fact or agency could be established as a situational case, from the fact of being a son to the act of announcing a reward for the performance of a deed. Usually, a lawgiver would describe the situational case in scrupulous detail, for this establishes the immediate factual basis of an obligation. The "legal effect," on the other hand, is the obligation linked to the situational case. It is a description of what ought to be the case after every manifestation of the situational case. The legislator would generally draft the legal effect in the form of a traditional obligation—a relation by which A has a duty to do or give T, and B a right to claim the owed T. But nothing prevents the lawgiver from drafting the legal effect in another form, for example where the fact X pertains; the law attaches the duty that B do T, without mentioning the creditor. Such is the versatility of the *ex lege* obligations.[132]

It goes without saying that lawmakers would attach a legal effect to a situational case because they find it appropriate that such effect follows from such case. The desideratum is that private law obligations observe a value, and that this value be transactional justice. But as we will see, ex lege obligations can be enacted to attend to the demands of a special class, which may run contrary to the demands of justice.

One can now see how useful the ex lege obligations are for rendering interested promises enforceable. The lawgiver has to institute a promise as a situational case—a person announces a reward to the public—and link it to a legal effect—the promisor is bound to pay the reward to any person who has performed the act. So expedient is this method that

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nella rigida scansione logica del sillogismo benedetto in tante pagine illuministiche. Ecco, chiaramente in che consiste, essenzialmente, la cosiddetta certezza del diritto.

Paolo Grossi, "Sulla odierna "incertezza" del diritto," in *Giustizia Civile*, n. 4, (2014), pp. 921-955, at p. 926.

[132] This legislative technique, qualified by Natalino Irti as "logicist" or "intellectualist", is mastered firstly in Ernest Zitelmann's book *Irrtum und Rechtsgeschäft*, 1879, and later in the work of Hans Kelsen. It was the theoretical response to the need for a rational calculus demanded by the emerging modern capitalism in the late nineteenth century Germany. "In questo quadro, il contratto è una tra le fattispecie; il rapporto giuridico ne è l'effetto." Natalino Irti, Un contratto <<incalcolabile>>, in *Rivista Trimestrale di Diritto e Procedura Civile*, Vol 69, No 1, 2015, pp. 17-23, at n. 1, p. 19. Contrast, however, my remarks in 2.4.3.2, note 152.

almost every 20th century Civil Code implemented it. Italy[133] and Portugal[134] are good examples.[135] Other countries legislated on promises in separate statutes, like France[136] and New York.[137]

2.4.3. TWO PROBLEMS WITH *EX LEGE* OBLIGATIONS

The doctrine of the *obligatio ex lege* cannot however pass without examination. I have identified two orders of problems here. The first one is of a contingent nature. It says that the doctrine of the *obligatio ex lege* is so flexible that, in using it, a lawmaker can introduce anti-juridical dictums into the private law. I use the German Civil Code to make this point. The second criticism recognizes that a legislator could use this doctrine to regulate promises in accordance with justice. As the doctrine of the *obligatio ex lege* could serve whatever goal, it could also serve justice. However, I argue that this ultimately cannot be. An *ex lege* obligation consists of a legal solution to a specific case. But interested promises are so fertile that, even where the legislator may be thought to have regulated all typical interested promises, another interested promise will appear, demanding equal treatment.

2.4.3.1. ON HOW *EX LEGE* OBLIGATIONS (COULD) ECLIPSE JUSTICE IN PRIVATE LAW

I want to elaborate this proposition: The doctrine of the *obligatio ex lege* enabled the German legislator to introduce anti-juridical dictums into its law of obligations.

Take §657 of the German Civil Code. "A person, who by public notice announces a reward for the performance of an act, in particular for the production of a result, is bound to pay the reward to any person who has performed the act, even if he [the latter] did not act

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[133] Arts. 1987-1991 (recognizing the promise of payment, recognition of debt and the promise to the public).

[134] Arts. 457-463 (recognizing the promise of payment, recognition of debt, the promise to the public and the promise of a prize for the wining of a challenge).

[135] See Pablo Lerner, "Promises of Rewards in a Comparative Perspective," in *Annual Survey of International & Comparative Law*, Vol 10, No 1, (2004), Article 4. Available at http://digitalcommons.law.ggu.edu/annlsurvey/vol10/iss1/4

[136] "The law of 10 of June of 1978, relative to the "information and the protection of consumers in the domain of certain operations of credit", in the field of immovable goods, disposes, in its art. 5, first paragraph, that "the deliver of the offer obligates the loaner to maintain the conditions that itself indicates during a minimal term of fifteen days to count from the moment of the emission"." Quoted by Jacques Ghestin, *Traité de Droit Civil. Les obligations. Le Contract: formation*, 2d ed, LGDJ, Paris, 1988, n.220, p. 236.

[137] Section 5-1109 of the New York General Obligations Law says: "Except as otherwise provided in section 2-205 of the Uniform Commercial Code [....] when an offer to enter into a contract is made in a writing [...] which states that the offer is irrevocable during a [stated] period [....] the offer [is irrevocable during that period.]" Quoted in Melvin Eisenberg, "Probability and Chance in Contract Law," UCLA L. Rev., 45, (1997-1998), pp. 1005-1076, at p. 1020, note 34.

with a view to the reward". Accordingly, under German private law the promisor of a reward is obligated to pay the reward to a person who, ignoring the promise, performs the act requested as the condition for the reward. It is obvious that the German legislator had some principle in mind at the time of establishing this norm. Be it the Germanic legal tradition, the autonomy of the will or a requirement of commerce, the legislator thought that §657 prescribed what was due to the case of a reward-promise. Whatever the legislator thought however, he could have never thought of justice in transactions.

Let me be graphic: Ignoring your promise of a reward, I find your lost property. I am aware of the fact that the thing I found belongs to you and I decide to return it to you. Nobody can say that I returned your lost property with a view to claiming the reward that you promised me. Then I come to know of your promise. My lawyer advises me to claim the reward and I do so. You deny the performance and I advance a claim against you in court. The claim I want to make is (in the German) of a *Forderung* against you. This is to say, a right I have to a performance of yours, which is the correlative of your duty to enact the promised performance.[138] This claim entitles me to the situation I would be in had you performed the promise—the so-called "positive Interessen."[139]

The question is very simple: Could I claim a performance that I have never acquired? As a general rule, persons acquire performances when they accept offers.[140] One could make the argument that someone acquires a performance by knowing of the act that granted it. After all, performances consist of expectations of future deeds[141] and persons can engender expectations by knowing (and only after knowing) the expectation-creating act (promise).[142] But how can someone demand another to put her in the position she would be in had the performance been effected, if she has never acquired the performance? To be able to claim the reward, I must have carried out the work with the view to actualize my *Forderung* to the reward. And, to acquire the *Forderung* to the reward or performance,

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[138] See Bernhard Windscheid, *Diritto delle pandette*, Carlo Fadda and Paolo Emilio Bensa translation, UTET, Torino, 1902, t. II, at §250-§252.

[139] *Idem*, §257.

[140] Old §305 BGB (now §311 (1)). See Bernhard Windscheid, *op. cit.*, at §305.

[141] I am taking notice that "expectations as the content of a right must not be confused with expectations of the right" Fernando López de Zavalía, *Derechos Reales*, Zavalia, Buenos Aires, 1989, t. 1, §3, n. 2, e), p. 48.

[142] The addressee must just "take cognizance of the act of promising itself, he must, as we would put it somewhat more exactly, consciously take in the promising (*des Verprechens innewerden*)." Adolf Reinach, "The A Priori Foundations of Civil Law," (translated by John Crosby), Aletheia, issue 3, (1983), pp. 1–142, at p. 28.

I must have at least known of your *Forderung*-conferring act.[143] Whatever the grounds for §657, it is clearly not focused on transactions between persons.[144]

Another juridical mistake of the BGB is found in §145. "Whoever offers to another to enter a contract is bound by the offer, unless he has excluded being so bound." Here the BGB links the fact of making an offer without stating the will to keep the power of revocation to the legal inability to revoke the offer.[145] This norm responds, according to the exposition of motives, to "a requirement of commerce."[146] Justice may serve commerce in many ways, after all, juridical private law is about justice *in* transactions and commutative justice is about ensuring exchanges. However there are instances where the demands of justice are incompatible with the interests of merchants. The situational fact of §145 is one such instance. Justice in voluntary transactions dictates that voluntary obligations are

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[143] Windscheid's interpretation holds that the promisor does not want to be obligated to any other than to one whom performs the requested condition, and not before such performance. Moreover, the promise or *Auslobung* must be accepted to have effect. Acceptance takes place when the addressee performs the required act. No one who has performed without knowledge of the reward "would have reason to the established reward, and I do not think that the jurisprudence will ever decide to recognize such maxim." Windscheid, *op. cit.*, §308, note 5, p. 194. Interestingly enough, Windsheid recognizes the binding nature of some unilateral acts. For example the pollicitatio, or the promises that are made to a city supported by a just cause. See *idem*, §304.

[144] Mayer-Maly's criticism of the theory of the obligation of socially typical conducts is pertinent:

> Where can we find the reason for this strange elevation of statute as a source of obligation? In continental states it is unquestionably the means of finding a way out of an embarrassing situation, such as always arises when a new cause of obligation does not fit into the categories of the existing system. As the new legal provision is a statutory provision, obligatione ex lege regularly helps to give an explanation by using the "to-be-explained". And nothing could be more attractive.

Mayer-Maly, cit., p. 383.

[145] Conf. Basil Markesinis, *op. cit.*, p. 64: "this binding effect can be avoided if the offeror expressly states this in the offer using, for instance, such words as 'offer subject to change' (*Angebot freibleibend*) or 'revocable offer' (*Angebot widerruflich*)."

None of the major contract laws endorse this rule. Without exception, the principle is that unless the offeror states it otherwise offers are revocable until acceptance. Nils Jansen and Zimmermann, Reinhard, Contract Formation and Mistake in European Contract Law: A genetic Comparison of Transnational Model Rules, Oxford J Legal Studies, 31 (4), (Winter 2011), pp. 625-662, at 13.

[146] Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich as translated in Arthur von Mehren and Gordley, James, The Civil Law System: an introduction to the comparative study of law, 2d ed., Boston and Toronto, Little, Brown and Co., 1977, p. 877. Interestingly enough, there is a passage where the German legislator sees a possible justification for the bindingness of business proposals. "The binding effect of the offer also corresponds to the rationally probable intention of the offeror himself. This is most apparent in the cases in which the offeror has set a certain time within which the declaration as to acceptance is to take place. The setting of such a period has, according to everyday conceptions, not only the meaning that the period within which the offer may be accepted is limited, but at the same time the meaning that the offeror binds his hands for this period." Idem. And why would he be interested in binding his hands? Because "the inclination to enter into contract negotiations would, in general, become less…" Idem. Yet, to justify the bindingness of business proposals, the proposal must be a promise, not an offer.

enforceable when they were produced as an item of exchange.[147] Under §145, an offeror who merely forgot to say that she wishes to retain the power of revocation can be stopped from revoking the offer by the offeree, for she is "bound by the offer." It is not clear what "bound by the offer" means.[148] Whatever it means, it seems that its *effect* is quite similar to a self-imposed obligation. The revocation of the offer will not be taken as such, and the offeror can take a reasonable time to accept the offer. Such a rule, as it is presented, goes against justice in exchange.

I set aside the question of whether the German law of obligations was determined in accordance with justice in transaction. One could interpret that it was. The Code talks about the obligations as particulars of a general idea—*all* the obligations are included in the book "*The* law of obligations"—and the norms on tort and unjust enrichment are clearly about compensation and restitution.[149] However, norms like §657 and §145 are clearly not about justice in transactions. The problem lies not only in the cases thereby regulated, but also in their systemic implications. Once enacted, these norms form part of the private law. If there are two, three or four such norms, they can be counted as legal mistakes or exceptions. However when there are more, or are constitutive of an important part of the law of obligations like contract law, they engender a risk. The judge can invoke them as a means of extending private law—filling gaps, solving hard cases and so on. Their principle of regulation becomes the idea with which the judge must rule on unprecedented cases. This is what Savigny famously called the "systematic canon of interpretation." Private law then begins to become incoherent, remaining as such or becoming something else. (See IP2.2.) The interests of commerce, the tradition of a people or the morality of freedom has either eclipsed or displaced the distinctive character of private law.

2.4.3.2. The injustice of this technique: The case of art 1987 Italian Civil Code

One of the points of ruling with the *ex lege* obligations is to make clear that only the decided cases give place to obligations.[150] The BGB makes this claim in a provision about

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[147] See long discussions in 4.1.4. and 5.2.2.1.

[148] See discussion of this point in 3.2.1.1.

[149] See argument in 4.1.1.1. (e).

[150] Art. 1090 of the Spanish Civil Code is abundantly clear. "Las obligaciones derivadas de la ley no se presumen. Sólo son exigibles las expresamente determinadas en éste Código o en leyes especiales, y se regirán por los preceptos de la ley que las hubiere establecido; y, en lo que ésta no hubiere previsto, por las disposiciones del presente libro."

legal transactions in general.[151] Other Civil Codes state the same in relation to our question. The paradigm is Art. 1987 of the Italian Civil Code, which says: "The unilateral promise of a performance does not produce obligatory effects outside of the cases admitted by statute."[152]

The *Codice Civile* here aims to resolve a tension.[153] On the one hand, there is the necessity to take into consideration the "exigencies" of promissory transactions. Treating them as unilateral acts—and not as agreements—is "more appropriate to the nature of the thing." On the other hand, the Code wants to maintain the indemnity of contract law: "It would not be possible to make the unilateral promise operate unlimitedly without disrupting the field of application of contract".[154] The "programmatic enunciation of Art 1987" resolves the tension by saying that only the promises admitted by statue obligate without acceptance.

But Art. 1987 gave rise to complications soon after its enactment.[155] New promises appeared in civil society that had no place in the short and *numerus clausus* list of

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[151] Old §305, now § 311 (1) says: "Obligations created by legal transaction [*rechtsgeschäft*] and obligations similar to legal transactions. In order to create an obligation by legal transaction and to alter the contents of an obligation, a contract between the parties is necessary, unless otherwise provided by the statute." In other words, unilateral legal transactions must be recognized by a special law, which provides for its enforcement. §657, which recognizes the enforceability of the *Auslobung* or promise of a reward, is one such special law. Conf. W. Flume, *Allgemeiner Teil des Bürgerlichen Recht*, 2 ed., Berlin 1975, pp. 135 and ss. Quoted in Pablo Lerner, "Promises of Rewards in a Comparative Perspective," *op. cit.*, p. 62, note 60.

[152] Ex lege obligations are not made to establish general grounds of liability. Suppose I say, "If a person makes a unilateral promise, then a person is obligated to perform." This statement looks very much like an *obligatio ex lege* in that it adopts the form of a conditional: If "unilateral promise" then "obligation." But this norm is not an *obligatio ex lege*. It is not saying, "A person, who by public notice announces a reward for the performance of an act, in particular for the production of a result, is bound to pay the reward to any person who has performed the act, even if he [the latter] did not act with a view to the reward". It is not describing a situational case or type of promise. The statement starts with, "If a person makes a unilateral promise." And this starting point demands the following specification: What is a unilateral promise? What the norm is doing is recognizing a new category of obligations. The legislator must then specify what is understood as a unilateral promise. She could say that unilateral promises are all promises intended to be obligatory without acceptance. Or add to this definition the requirement of a cause. Whatever the formulation, the legislator would be setting out a general basis for the recognition of liability in promises. This is more than validating typical interested promises. The degree of specification with which a norm describes the situational case seems to be constitutive of obligationes ex lege: they must be readily applicable situational cases. See the interesting remarks in Emilio Betti, *Teoría general de las obligaciones,* t. II, José Luis de los Mozos translation, Revista de Derecho Privado, Madrid, 1970, §II, n. 8 in fine p. 57; Françoise Geny, *Methods d'interpreation et sources*, 2 ed, Librairie générale de droit et de jurisprudence, Paris, 1919, n. 80, p. 185.

[153] *Relazione del Ministro Guardasigilli Grandi al Codice Civile del 1942, Libro IV Delle Obbligazione*, at n. 783, p. 177. Available at http://www.consiglionazionaleforense.it/site/home/pubblicazioni/collana-studi-storici-e-giuridici/articolo6388.html

[154] *Idem*, at n. 781, p. 176. I solve this very nice conceptual issue in 5.7.

[155] One could conjecture that the norm was due to the fact that the Italian legislator could not perceive the rationale or justice of these promises. The unilateral promise provisions were developed around 1930-

enforceable unilateral promises. Disputes in relation to the new promises would arrive to court and the courts would have no remedy other than to reject these demands. Studies on the character of these cases proliferated. The insightful doctrine of Gino Gorla argued that these promises are intelligible as an exchange of a right for a chance. In other words, Gorla discerned the unity of the "promesse unilaterale" and its specific difference as against the contract. But the problem remained. How to ground this new general source of obligations given the explicit dismissal of art 1987?[156] We can now see the problem. For example, in a case of a "*letre du patronage*" (see 1.1.3.) before an Italian court, the court can either stick to the letter of the law or think systematically. If the Court sticks to the positive law, a neglected "*letre du patronage*" must not be enforced. Art. 1987 is very clear that enforceable promises are promises admitted by statue, and no legislation has so far provided enforcement for the "*letre du patronage*." However, if the court thinks systematically it must enforce the promise, because in light of Gorla's position, this promise is analogous to promises that the Court must enforce. One could still argue that the way out of this problem involves ruling on the atypical case with a new provision. Persuasive scholarship has outlined the inconveniences of this legislative technique.[157] I want to add that the issue of justice remains. Nothing guarantees that this atypical case will be the last atypical interested promise. In other words, if a law chooses to legislate promises on a case-by-case basis, even when it manages to cover all the extant interested promises, the law creates the possibility of injustice.

Given that we have finally discovered the character of promises (See 1.1.4.), perhaps the solution is to do with them what, in the time from Bartolo to Grotius, was done with the various Roman law contracts—transform them into a single general category. We will hence satisfy Mayer Maly's prescription: "It is necessary to reduce into categories the essential causes which lead to an obligation."[158]

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42. Then the interested promises were rare cases. In other words, they were so few that it was difficult to perceive a general explanation for them all. As Giorgianni has pointed out, the case-by-case treatment of the unilateral promise "was probably connected to the issue of the cause". Michele Giorgianni, "Appunti sulle fonti dell'obbligazione," in *Rivista di Diritto Civile*, I, (1965), pp. 70-75, at p. 73. They could not see that what the promisor was seeking with her promise was to induce the promisee to do something she wants.

[156] See the discussion in Francesco Di Giovanni, *Le Promesse Unilaterali*, CEDAM, Milano, 2010, p. 55 and ss.

[157] Ewan McKendrick, "Taxonomy: Does it matter?," in Johnston, David and Reinhard Zimmermann (eds.), *Unjustified Enrichment: Key Issues in Comparative perspective*, Cambridge University Press, Cambridge, 2002, pp. 627-657, specially Section III, pp. 632-638.

[158] Mayer-Maly, *op. cit.*, p. 384: "In the year 3000 our future colleagues may find a vast sphere of activity because they will not be able to believe that distinguished professors of modern civil law have written what they actually have written. The difficulty the romans had with their *divisio obligatonum* is our difficulty as well."

2.BIS SUMMARY. RELEVANCE OF MY HYPOTHESIS

Contemporary private laws do provide tools for dealing with interested promises. However, these tools are problem-causing solutions. They are solutions because they offer legal responses to the intuitively unjust revocation of a non-accepted interested promise. Yet they are problem-causing solutions because they corrupt the laws where they are implemented. Allow me to outline the conclusions.

The collateral contract can be an effective tool for enforcing interested promises, especially those that condition the performance of the obligation on an act by the promisee. With this legal figure, one can present the promise as an offer, the commencement of the required act as the acceptance of such offer, and the creation of the chance as consideration for the alleged obligation. The lawyer must elaborate only two facts. Firstly, she must show that the offeree commenced to perform the act required in the promise. And second, she must show that the latter act had as an effect an increase in the probability that the promisor gets what she wants—recover the lost thing, make the promised contract, etc. With these facts in hand, accordingly, a plaintiff can prevent the promisor from revoking an interested promise. However, the collateral contract corrupts contract law. The law that implements such a figure is a law that creates new versions of acceptance and consideration. Now, acceptance of a unilateral contract not only means performance of the act required in the offer, it also means commencement of the performance. Now, consideration for the obligation of a unilateral contract not only means the act that the debtor of the obligation wants in exchange for the obligation, it also means an increase in the probability that such an act takes place. With these two concepts in hand, a plaintiff can prevent a defendant from revoking a *true* offer of a collateral contract. An offeror who wanted to be bound if and only if the offeree fully performed a certain act happens to be bound without having the offeree perform this act. As a result, contract law is no longer about *agreed* exchanges—it has been deformed or corrupted.

The reliance doctrine is probably the least pertinent of the three solutions. Since what it protects is the detriment that a promisee suffered in reliance on a promise, the doctrine cannot be used to demand compliance with the promise. However the gravest imposition is visited upon the private law that implements the doctrine. Private law fundamentally divides the acts that obligate persons from the acts that persons can engage in freely. The obligations are justified not only by the fact that the act of one caused another to act to her detriment. In addition, the person who makes another act in detrimental reliance must be enriched in some way. Tort explains this enrichment with the concept of wrong - the idea that doing beyond what one is permitted is like profiting from the fact of not doing the right thing. Contract explains it with the concept of cause - the idea that one can

demand performance of a voluntary obligation only without having given something in exchange. The reliance doctrine is not concerned with the question of justice. Rather, the basis for imposing an obligation is the fact that someone caused another to act with detriment to herself. But then almost every expectation inducing conduct could mature into a cause of obligation, from the breach of contractual negotiations, to not respecting a promise of dinner, to unexpectedly quitting a relationship. To persons in private law it becomes quite difficult to assert what conduct would place them in an obligation. Inserted in private law, the reliance doctrine and its demands blur the just division between freedom and obligations—it corrupts the private law.

Of all the solutions revised, the doctrine of the *obligationes ex lege* is the most effective one. A lawgiver must just identify the promise she wants to enforce and institute such promise as the antecedent of a voluntary obligation. The interested promise thus becomes a valid cause of obligation. Yet within this doctrine inheres a risk. Such is its malleability that lawgivers can use it to determine unjust law. We saw unjust transactional law in §657 of the German Civil Code. However, this is a contingent criticism. The same procedure could regulate promises in accordance with justice. Nevertheless, as we could see in the case of the Italian Civil Code, this technique is inadequate in the case of interested promises. The *ex lege* obligations are case-by-case solutions, to each typical promise a specific legal provision, while the interested promises constantly grow in diversity. Where the legislator may be thought to have fashioned just solutions for all the extant interested promises, civil society will have developed another unprecedented and therefore unenforceable interested promise. This possibility is itself an injustice. In enforcing the accounted for, typical interested promise and not enforcing the unprecedented atypical interested promise, the law fails to treat like cases alike.

To finish where we started: whether private law should deal with interested promises and how it should do so, is an interesting and unsettled question. Even if contemporary private laws deal with these promises, they have not yet found the correct way to do it. Moreover, most of the solutions that private laws have so far produced are problem-causing solutions. The private law that implements them no longer functions as it functioned before.

3. AN ALMOST JUST SOLUTION: THE CONCEPT CALLED "UNILATERAL PROMISE"

The current laws on promises, or as we can call them after our critical revision, the inimical private law arrangements, date from the mid-nineteenth century. This was when the classical private laws began to face new or atypically challenging realities.[159] An exegete of the French civil code like Demolombe would construe a version of the collateral contract to justify the irrevocable character of firm offers of sale.[160] Savigny, a modernizer of Roman law, would wonder whether the promise of a reward should be enforced before acceptance, concluding that such a hypothesis is contrary to principle, that in any case the promisee could have an action for the recovery based on the detrimental reliance.[161] The cases of interest are not only the firm offers of sale and reward-promises. Mid-nineteenth century jurists also considered cases like titles of credit, marriage promises and stipulations for the benefit of third parties.

The idea arose, first in Germany and then in France, that these promises should be explained by a simpler idea, the idea that whenever one declares the intention to be obligated to do something, one is obligated to do such thing.[162] German and French

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[159] The socioeconomic context where the recent interest in unaccepted promises flourished is well depicted in A. W. B. Simpson, "Quackery and Contract Law: The Case of the Carbolic Smoke Ball," in *The Journal of Legal Studies*, Vol. 14, No. 2, (Jun, 1985), pp. 345-389 and the teaching decision *Alexander Brogden v Metropolitan Railway Company*, (1876–77) L.R. 2 App. Cas. 666-698.

[160] The doctrine of "avant-contrat tacite" suggests that offers to the public combine an offer to sell, which remains open for acceptance, and an offer to keep the option open, which is deemed to be accepted when it becomes known to the offeree. The latter acceptance must be assumed on the grounds that the proposal is only beneficial to the offeree. Charles Demolombe, *Traité des contrats ou des obligations conventionnelles en general*, T. I, Hachette et Cie, Paris, 1877, n. 65, p. 64.

[161] The case of an offer made by public means to pay a sum in compensation for notice of a fact or the restitution of a lost thing cannot be resolved by saying that the performance of the fact gives action to claim the offer, nor can it be solved by saying that the offer has no legal effect at all. The promised sum will be paid voluntarily, as occurs in many cases of debts arising from gambling, which are paid many times more often than the debts are endowed with an action. As a question of justice, Savigny finishes, whosoever incurred expenses while performing the act in question will have an *actio doli* as against the offeror for the recovery of the expenditures. F.C von Savigny, *Le obbligazioni*, Giovanni Pacchioni translation, T. II, UTET, Torino, 1912, §61, p. 82-87, especially at p. 85.

[162] It goes without saying that the rule that promises must be kept is as old as our Western civilization. The very Digest of Justinian instituted legal solutions to very interesting cases of promises (See Digest of Justinian, 50,12 *De pollicitationibus*). What I am saying is that the nineteenth century lawyers had no tools to treat unaccepted or unrequested undertakings. They could not perceive and regulate promises simply because their legislation said nothing about them. The jurists that systematized the classical private laws explicitly neglected the possibility of an undertaking binding without request or acceptance. Such possibilities are famously neglected by Grotius (Hugo Grotius, *The Rights of War and Peace*, edited and with an introduction by Richard Tuck, Liberty Found, Indianapolis, 2005, Book II, Chapter XI, n. XIV), Pufendorf (Samuel von Pufendorf, *The Whole Duty of Man According to the Law of Nature*, trans. Andrew Tooke, Liberty Fund, Indianapolis, 2003, Chapter IX, n. XVI) and Pothier (Robert

scholars developed this idea in the form of a new basis for imposing obligations. The Germans called it "Versprechen" (promise) and the French "declaration unilateral de volunté" (unilateral declaration of will). Interestingly enough, a similar phenomenon took place in the common law world too. In the middle of the twentieth century, a movement of Scottish scholars reacted against the common law of contracts, arguing that a historical legal category of their own provided a better basis for the enforcement of promises. The Scottish category is almost identical to the French "declaration unilateral de volunté" and the German "Versprechen". They called it "unilateral promise."

We need to bypass this category. Not only because the national private laws dedicated a great deal of scholarship to it, but also and principally, because the most influential projects of international private laws have claimed it as their own. Indeed, probably the most provocative contribution of the Principles of European Contract Law (PECL) is its section on promises. Under the rubric "Unilateral promise," Art. 2:107 states: "A promise which is intended to be legally binding without acceptance is binding." This recognition has made of the unilateral promise an authorized solution to the problem of promises in private law. It could therefore be the case that this new voluntary cause of obligation fills the legal vacuum noted in Part 1. Maybe this must be the legal form of promises and the best alternative to the arrangements dismissed in Part 2.

Section 1 focuses on the three seminal works on unilateral promise. The first three headings are dedicated to the works of Heinrich Siegel, René Worms and the Scottish institutionalists. I want to show that these three works have three points in common: Their definition of unilateral promise, the interest that made these scholars develop a new legal concept, and the tradition with which these scholars engage. The first section finishes by arguing that Art. 2:107 of the PECL shares these characteristics. Section 2 criticizes the concept of unilateral promise. The unilateral promise scholars developed a new private law concept because they found that practice demanded legal innovation. Thus they claimed that private law should recognize the obligatory character of all promises intended to be legally binding. The problem I see is that rather than justifying this concept from a legal perspective, they relied on alien justificatory ideas, like the doctrine of the autonomy of the will. This meant the legal concept they presented was not actually a legal concept. However, there is a lot to learn from these progressive scholars. The first and most important lesson is that jurists can react against the status quo of the

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Joseph Pothier, *A Treatise on the Law of Obligations, or Contracts*, David Evans translation, Strahan, London, 1806, n. 4, pp. 4-5), a book which had a significant impact in the the common law. Conf. Joseph M. Perillo, "Robert J. Pothier's Influence on the Common Law of Contract," in *Texas Wesleyan Law Review*, Forthcoming. Available at SSRN: http://ssrn.com/abstract=610601 (29-1-2016.)

law. Like the unilateral promise scholars, one can build for the continuation of one's private law—make new law for new realities. Section 3 develops this lesson and infers others that contribute to and connect us with the next stage of the PhD's enterprise.

3.1. THE CONCEPT CALLED "UNILATERAL PROMISE"

3.1.1. HEINRICH SIEGEL'S *VERSPRECHEN*

In 1873 Heinrich Siegel, a Viennese historian of German law and private law theorist, wrote what is probably the basic reference treatise on the question of promises and private law. In '*Das Versprechen als Verpflichtungsgrund im heutigen Recht,*'[163] Siegel defends the thesis that a unilateral promise could be regarded as a source of duties or *Verpflichtungsgrund*.

Siegel was struck by a series of increasingly important cases, including the offer to an absent party, the irrevocable offer, the bid by auction, the promise of a reward and the promise of a prize, the titles of credit to the bearer, and the stipulation in benefit to a third party. To Siegel, the complications to explain the obligations arising from these acts were originated in the doctrines that the Germans received from the Romans. The remotest antecedent of the idea of a contract is the Roman verbal contract called *stipulatio*. In the formation of a *stipulatio*, a second person would obligate himself to do something by accepting the request of a promise made by the first stipulator, or creditor of the obligation. In contrast, the manner of forming voluntary obligations in the Germanic laws featured a debtor who first assumed a duty to do something and then a second person who would receive (*Annahme*) the duty, which already existed. If in the Roman *stipulatio* the historical and logical *prius* was the creditor, in the Germanic laws the historical and logical *prius* was the debtor. The procedure for assuming obligations in German law placed the debtor—rather than the creditor—as the first and most important actor.[164]

Siegel nevertheless shared many commitments with the German followers of the Roman law tradition. He was keen on abstraction and a follower of the will theory. The all-encompassing abstraction of the period was the category called the "juridical transaction," a generalization that represented all acts susceptible of creating, modifying

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[163] Heinrich Siegel, *Das Versprechen als Verpflichtungsgrund im heutigen Recht*, Vahlen, Berlin, 1873. I follow the interpretations of Paolo Recano, "Profili storici della promessa unilaterale," in *Rassegna di Diritto Civile*, fasc. 1, (2006), pp. 168-223 at n. 3, pp. 199-205 and Francisco Candil y Bravo, "Naturaleza jurídica de la promesa de recompensa á persona indeterminada," in *Junta para ampliación de estudios é investigaciones científicas*, t. XIII, Memoria 3ª, 1914, pp. 283-339 at pp. 297-300.

[164] Heinrich Siegel*, op. cit.*, p. 1-16.

and extinguishing legal effects, from the testament to the contract, which was the paradigm. The will theory held that the legal effects of the legal acts were ultimately grounded in the will of the persons, which had a creative power recognized by the legal order. The legal order recognizes the creative power of the individual, who utilizes it by means of diverse legal acts.[165]

The Germanic model of contractual obligation, infused with the will theory, enabled Siegel to elaborate a theory for the problematic promises:

> When someone, by his own initiative desires to obligate himself with an offer, why is it that the law should not concede it? Shouldn't his conduct be governed by his unilateral manifestation of will?[166]

If the will of the individual had such a creative capacity, it should be autonomous enough so as to put to itself a duty to do something. To Siegel, given the actual development of transactions in society, whether a person could constitute himself a debtor by his own word could not be in doubt.[167]

Having elaborated his theory from the perspective of the will theory, Siegel had to face a counter-argument. True, one can modify one's sphere of rights by unilateral will, but a voluntary obligation, the object of a promise, also modifies the creditor's sphere of rights. The promisee acquires a right to which he does not consent. Through promise, therefore, someone acquires a right without deciding so. How can that be?[168]

Siegel eschews the argument with the following distinction. One thing is the "obligation to execute the promise" and another thing is the "obligation to keep the promise." [169] The obligation to execute the promise is an obligation in the Roman law sense—namely, an obligation backed with an action of the creditor to demand performance. The obligation to keep one's promise is the necessary antecedent of the obligation to execute the promise. Thus Siegel can say that a simple promise, given certain conditions, binds a

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[165] Independently of the considerations related to the cause (*abstraktionwille*). For further explanations see Paolo Recano, "*Profili…*," *op. cit.*, p. 200-1, especially note 101.

[166] Heinrich Siegel*, op. cit.*, p. 49

[167] "…regardless of the fact that the promisor obtains a benefit with the promise or not." Heinrich Siegel, *op. cit.*, p. 50.

[168] I engage with this argument in 6.1.

[169] Heinrich Siegel*, op. cit.*, pp. 20 and 41-45. Even if we accepted that the promise modifies the addresse's sphere of rights, this legal phenomenon also occurs in other parts of private law. In the case of extra-contractual responsibility—tort law—the tortfeasor creates a right on the part of the victim by choosing to do the tort, a right that falls into the victim's sphere without any requisite acceptance. *Idem.,* p. 47.

person to keep his promise. In the promise of a reward (*Auslobung*), for example, the promisor has only a duty to keep his word; the obligation to execute the promise arises when the promisee performs the requisite act. Since the promisor is not obligated to someone but simply obligated, nobody suffers an unconsented attribution of a right. [170]

Siegel did not argue that promise is the only source of voluntary obligation.[171] Nor did he construe a general theory of the unilateral promise. His contribution was his revision of the dominant view that agreement is the only way to create voluntary obligations, developing the idea that unaccepted promises could sometimes create obligations, and illustrating this thesis by application to the most important cases of his time.[172]

3.1.2. René Worms's *volonté unilatérale*

René Worms, founder of the "Revue Internationale de Sociologie" and professor of political economy, set out in his doctoral dissertation—"De la volonté unilatérale considérée comme source d'obligations en droit romain et en droit français"—to explore whether the theory envisaged by Siegel could be read into Roman (Part 1/2) and French private laws (Part 2/2).[173]

Part 1 of *De la volonté* studies whether the theory of the binding effect of unilateral declarations of will had any instantiations in Roman law. Worms finds four possible cases, of which the *pollicitatio* and the *votum* are the best candidates.[174] A pollicitatio consist in

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[170] Interestingly, he says that acceptances of promises are always accessorial. They are accessorial in that they are a condition for the formation of the obligation insofar as the promisor posited it as a condition for the formation of the obligation. Heinrich Siegel, *Das Versprechen*, 20 and ss.

[171] Of the eight cases studied in his work only the following four are seen as unilateral promises: promise to the public, title of credit to the bearer, bill of exchange, and the contract for the benefit of a third party. Paolo Recano, "*Profili…*," *op. cit.,* p. 203.

[172] The work appears more often as a form of criticism of views like that of Savigny, which rejected that law had to accept that a promisee acquire a right without having accepted it on the grounds of the "exigencies of commerce." Of special consideration was the case of stipulation for the benefit of third parties. Conf. Adolfo di Majo, *Le Promesse Unilaterali*, Giuffrè, Milan, 1989, p. 24.

[173] René Worms, *De la volonté unilatérale considérée comme source d'obligations en droit romain et en droit français*, (thèse pour le doctorat présentée et soutenue le mardi 23 juin 1891, Université de France, Faculté de droit de Paris, by René Worms), A. Giard, Paris, 1891.

[174] A third case is the promise to an indeterminate person, which Worms dismisses on the grounds that Roman law provided no action for the enforcement of such a promise. (*Idem,* Part. I, Chp. II, II.) The last case is that of stipulation for the benefit of a third party, which is also dismissed. (*Idem,* Part. I, Chp. II, I.) Even if post-classical Roman law recognized an action for the third party beneficiary, the action arose from a contract between promisor and stipulant, who acted as an agent of the beneficiary. *Idem*, pp. 80-81.

a promise made by a person to a city concerning a sum of money or a certain deed.[175] A votum is a promise made by a person to a deity that seeks to propitiate a good or avert an evil.[176] Though the examined texts suggest that the obligations of pollicitatio and votum arise from a unilateral declaration of will, the principle in classical Roman law is that a declaration of will to do something in favor of another cannot birth an obligation without agreement of the beneficiary. The post-classical Roman law dispensed the requisite of acceptance for the pollicitatio and the votum in view of the special character of the addressees of these declarations. Since both are moral persons (in one case a city, in the other a god), they are unable to accept or reject the proposal. Worms believes that Roman law dispensed with the requisite acceptance in these two isolated exceptional forms of obligations to satisfy "pressing practical needs."[177]

Part 1 concludes that a general theory of unilateral declarations cannot be inferred from the Roman law texts. The principle in Roman law is that obligations emerge from agreements. To see the movement towards the reformulation of this rule we must look at the contemporary law.

Part 2 of *De la volonté* studies French laws and decisions to find applications of the new theory. Worms identifies two main instances in the cases he analyses. The first one occurs where someone obligates himself to an indeterminate person, as in the case of an individual releasing into circulation a title obliging him to pay money to whomever bears the title and makes a claim on its value. The obligation emerges even if the requester is indeterminate at the moment the title entered into circulation. The creditor is the person who happens to bear the title at the moment of its claim.[178] But practice demands even more, Worms says. It requires that a person could obligate himself not only as to an indeterminate person but also as to a thing, an entity devoid of will. This is the promise to establish a foundation, by which someone obligates himself to give money or do a work

[175] Part II Chapter III extensively studies the polliticatio, answering questions like who can be the addressee of a pollicitatio, who can be obligated by a pollicitatio, under which conditions does the pollicitatio bind the author? He explores the conditional pollicitation and the effects of the pollicitation, like the obligation of the promisor, the sanctions in case of non-performance and the extinction of the obligation. *Idem*, pp. 41-55.

[176] Part II Chapter IV studies the vote in the same analysis that he studies the pollicitatio. *Idem*, pp. 61-74.

[177] *Idem*, pp. 82-84.

[178] *Idem*, Part II Chapter V, pp. 149 and ss.

to establish a non-profit organization. The creditor of such a proposal is the entity emerging from the declaration itself. [179]

The second case of interest for Worms is that of contract itself. Chapters VI and VII of Part II advance a general theory of the contractual offer. The offer is a unilateral juridical fact that engenders its own legal consequences. The legal consequences of an offer are two-fold, the obligation to honor the given word and the obligation to perform the promised performance.[180] This theory has application not only to firm promises like the option to make a contract, but to all contracts. After all, "what is a contract if not an offer and an acceptance?"[181] The offeror engages himself on condition that the other party engages himself reciprocally, which is the counter-obligation that the acceptance formulates. The acceptance accordingly is simply the condition that gives effect to the engagement first initiated by the promisor with his unilateral declaration of will. It follows from this that each party was obligated by his declaration of will. Acceptance is not the cause of the offer, but simply the condition under which the offeree can make a claim on the offeror. Each of the two manifestations, the offer and acceptance, are autonomous. Each would have its own conditions, effects, its own dates of expiration, because each one has its own cause, and each suffices to bind its author; "this is what is logical and necessary."[182]

Worms attempts to decipher the rationality of things. History shows a movement towards the recognition of the individual will as a source of law. In Roman law this is but dimly observable. The actual legislation evinces a certain prudence, recognizing that the unilateral declaration of will creates obligations in certain specific cases. The social needs begin to push aside the old tradition and "force the jurists to build the new theory."[183] "It is no longer about a mere bunch of exceptional cases, it has become a system that tends

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[179] "Bien plus, elle paraît exiger meme qu'on puisse s'obliger, toujours par sa seule volonté, non plus meme envers une personne indeterminée, mais envers une chose, envers une oevre: tel est le cas de la promesse de foundation." *Idem*, p. 90.

[180] *Idem*, p. 171

[181] *Idem*, p. 184

[182] *Idem*, pp. 190-191. A purely consensual contract is composed of two obligations, one at the charge of each party. Each of these obligations requires only the consent of the party that obligates himself, and his capacity to do so. Each has its own object and each has its own cause. Each one can produce effects independently of the other, for if it happens that the thing that one party has obligated herself to do is not realized, the other party will not be released from his own obligation. Moreover, the two obligations can split into two separate things, as in the contract par correspondence. So for what reason should we look for the meeting of two wills? Can we affirm that such a meeting occurs? Isn't it simpler to see the two obligations as distinct things? Hence, even in the field of contracts the new theory has important applications. *Idem*, p. 185.

[183] *Idem,* 198.

towards genericity." [184] Such a belief is based on the *données* that summarize the evolution of law itself. "What characterizes this trend, in effect, is the constant progress that law has done in the direction of the human will's emancipation." [185] The theory has not been assured in all its points. But…

> the moment comes, we believe, where the validity of the engagement undertaken by a unilateral declaration of will must be fully recognized, without prejudice, of course, as to this other principle, that no one can become a creditor against his will. These two principles, seemingly opposed, are in reality mutually implicated, because both of them are not but the consequence of the sovereign rights that must be recognized to the individual will. The increasing comprehensive recognition of these rights will be the work of the future. Reason and history assure us that such a work will be accomplished.[186]

3.1.3. THE SCOTTISH *UNILATERAL PROMISE*

With the Union of 1707, Westminster could enact law for Scotland and the House of Lords became Scotland's final court. [187] Since the law lords generally ignored the peculiarities of Scots law, they judged Scottish cases from the common law perspective. Scottish private law thus entered a process of transfiguration. The common law's rules, concepts and classifications gradually overarched the specificities of Scottish private law. By the second half of the nineteenth century, Scots law "was away from *the jus commune.*"[188]

The eclipse of Scottish private law found opposition in a movement of jurists that arose in the middle of the twentieth century. T. B. Smith, the main scholar in this field, claimed Scottish private law was not only a variant of the common law, but also of the civilian tradition.[189] This depicts Scottish private law as having a hybrid nature. Moreover, certain institutions of Scottish private law explain civil and commercial practices better than the

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[184] *Idem*, p. 94.

[185] *Idem,* 199. Law in Worms is the jurists' ascertainment and progressive systematization of the judicial decisions inspired by the pressing social needs. When the social needs make the judiciary issue certain decisions according to which in certain cases the debtor can obligate himself without agreement of a second party, the jurists try to coordinate those decisions and work out theoretical explanations. They will find precedents in roman and Germanic laws and also a rational foundation to the idea that a person can by his own will obligate himself. *Idem*, 90-91.

[186] *Idem*, p. 200.

[187] See John W. Cairns, "Historical Introduction," in Kenneth Reid and Reinhard Zimmerman, (ed), *A History of Private Law in Scotland*, Oxford University Press, Oxford, 2000, p. 15 and ss.

[188] Claire McDiarmid, "Scots law: The turning of the tide," in *Juridical Review*, Vol 3, (1999), pp. 156-169, at p. 158.

[189] See T.B. Smith, Studies Critical and Comparative, Oceana, Edinburgh, 1962. For a critical review: F. H. Lawson, "Review of *Studies Critical and Comparative* by T. B. Smith," in *Harvard Law Review*, Vol 77, No 1, (Nov. 1963), pp. 204-406, at p. 204.

common and civil private laws. Central examples are the *Ius Quaesitum Tertio* (or the issue of the third party beneficiary in contracts), and unilateral promises.

The unilateral promise is presented as "A uniquely Scots institution."[190] A unilateral promise is "a declaration by which one party commits itself to some future performance in favour of another, and to which commitment it binds itself as a result of that declaration alone."[191] This concept can live within the Scottish legal system because Scottish private law does not restrict the formation of voluntary obligations to the common law's offer and acceptance model, and never fully endorsed the doctrine of consideration. Indeed, "Scots law has a tradition of enforcing promises."[192] The Court of Session, which was the highest court for Scottish legal matters before Scotland's incorporation into the United Kingdom, has been enforcing promises since at least 1551. Examples include both onerous and gratuitous promises, like a promise to warrant a loan of money, a bare promise to pay an annuity, a case of an option to purchase a shop, and a promise to keep an offer open.

One may wonder however, why was it that Scottish courts, unlike all other private law courts, implemented the concept of unilateral promise? The answer for the institutionalist is mainly historical. During the fifteenth century, it was common for Scottish jurists, moralists and philosophers to distinguish the act of promising from the act of agreeing. Viscount Stair, "the father of Scottish law"[193] to these writers, treated promise as something different from contract.

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[190] Reinhard Zimmermann, Visser, Daniel and Reid, Kenneth "Formation of Contract," in Zimmermann, Reinhard, Kenneth Reid and Daniel Visser (eds.) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa*, Oxford University Press, Oxford, 2004, at 53.

[191] Martin Hogg, "Promise: The neglected obligation in European Private Law," in *International and Comparative law quarterly*, Vol 59, (April 2010), pp. 461-479, at pp. 461-2.

[192] William McBryde, "Promises in Scots Law," in *The International and Comparative Law Quarterly*, Vol 42, No 1, (Jan. 1993), pp. 48-66, at pp. 55 and 60, where he gives many examples. Though on p. 60 he says: "It would be a mistake to imagine that promises were or are frequently enforced in Scottish courts. The reality is probably that few practitioners and judges have acquired a familiarity with this area of law. In the last 25 years there has been only one reported case with a clear unilateral promise. The case is Bthgate v. Rosie, in which a mother promised to pay for the repair of a shop window damaged by her son." Conf. Laura Vagni, who maintains that Scotland does not enforce purely gratuitous promises. "The Enforceability of Promises in Scotland and in The European Contract Law: A Comparative Analysis from an Italian Perspective," in *Comparative Law Review*, Vol. 2. Available at http://www.comparativelawreview.unipg.it/index.php/comparative/article/view/43 (27-1-2016)

[193] "The Scots Grotius was James Dalrymple, Viscount Stair. For in the same way that Hugo Grotius' *Inleydinge tot de Hollandsche Rechtsgeleertheydlaid* down Roman-Dutch law in the mid-seventeenth century, the publication of Stair's *Institutions* some fifty years later constituted Roman-Scotch law." Kenneth Reid and Zimmerman, Reinhard, "The development of legal doctrine," in Kenneth Reid and Reinhard Zimmerman (eds.), A History of Private law in Scotland, Oxford University Press, Oxford, 2000, p. 6.

Stair begins by distinguishing three forms of will manifestations: desire, resolution and engagement.[194] Desire is a tendency of inclination of the will towards its object. This first motion of the will is insufficient to constitute a right. A resolution is an expression of an intention that one will do something in the future, which similarly cannot impose obligations on the utterer. The source that binds the will cannot lie solely in the will itself, hence it is always open for a person who resolved to do something, even where the intention is to benefit another, to change his mind. "It remainsth then that the only Act of the Will, which is efficacious, is that, whereby the Will confersth or states a power of exaction in another, and thereby becoming ingaged to that other to perform."[195] This last act of the will is the "Engagement."

Having distinguished nonobligatory and obligatory resolutions, Stair then divides the obligatory acts in two classes, the absolute and pure (promise), and the conditional (pollicitatio and contract). He says: "the Obligatory Act of the Will, is sometimes absolute and pure, and sometimes conditional, wherein the condition relates either unto the Obligation itself, or to the performance"[196] When the condition affects the obligation we are in the presence of a contract: "the very Obligation itself is pendent, till the condition be purified, and till then it is no obligation, as when any offeror tender is made, there is implyed a Condition, that before it becomes Obligatory the party to whom it is offered must accept."[197] When the condition affects the performance we are in the presence of a pollicitatio. The conditional obligations bind upon the granting thereof and cannot be recalled; "yet they are only to be performed, and have effect, when the condition shall be

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[194] James Viscount of Stair, *The institutions of the law of Scotland*, the Heir of Andrew Anderson, Edinburgh, 1693, n. 10.2. p. 91. (Available in Google books)

[195] *Idem*, n. 10.2. *in fine*, p. 91.

[196] *Idem*, n. 10.3, p. 91-2. The interpretation of this paragraph is controverted. I follow G. MacCormack, "A note on Stair's use of the term pollicitatio," in *Juridical review*, Vol 21, (1976), at pp. 121-126. The other thesis holds that the threefold classification appears in the Institutions but was not meant by Stair. It is the result of a mistake produced by the editors of the Institutions. The true division is twofold, promise (which includes pollicitation) and contract. MacCormack advances more convincing reasons. Another reason to follow MacCormack's view is, in my humble opinion, that Stair uses the words "conventional obligation" in the quotation from Grotius, and in this quotation, (precisely, Iure belli, XI, XVI), Grotius is talking about the Roman pollicitatio. T.B. Smith, "Pollicitatio - Promise and Offer, Stair v. Grotius," in *Acta Juridica*, 1958, (1958), pp. 141-152. (However Smith sustains that this is an incorrect division, that pollicitatio is not something different from promise and offer but the genus that comprehends them. As a firm, enforceable promise, the pollicitatio is an unconditional unilateral act, which binds the maker immediately after it is made. But a pollicitatio can also be an offer; this occurs when one someone conditions the obligation of his pollicitatio on the acceptance of the creditor.)

[197] "[A]n offer accepted is a Contract, because it is the Deed of two, the Offerer and Accepter." James Viscount of Stair, *op. cit.*, n. 10.3, p. 91-2.

existent." [198] Finally comes the promise: "But a promise is that which is simple and pure, and hath not implied in it as a condition, the acceptance of another."[199]

He then engages in argument with Grotius, to defend the view that promises can obligate without acceptance: "In this Grotius differeth; holding, 'that acceptance is necessary to every conventional obligation in equity, without consideration of positive law," and to prevent that obvious objection, that promises are made to absents, infants, idiots or persons not yet born, who cannot accept, and therefore such obligations should ever be revocable, till their acceptation, which in some of them can never be; he answereth, that the civil law only holdeth, that such offers cannot be revoked, until these be in such capacity to accept or refuse.' In other words, the reality, which Grotius neglects, shows that promises can be obligatory without acceptance. Stair finds support in the authority of other law: "promises now are commonly held obligatory the canon law having taken off the exceptions of the civil law, de nudo pacto." He finishes with the following clarification: "It is true, if he in whose favour they are made, accept not, they become void, not by the negative non-acceptance, but by the contrary rejection. For as the will of the promiser constitutes a right in the other, so the other's will, by renouncing and rejecting that right, voids it, and makes it return."[200]

Stair's classification of the engaging acts and strong recognition of the obligatory character of simple promises would "set Scots law on a path different from some other civilian systems and also from the common law."[201] This is why today, in Scots law, "a man may bind himself informally more or less to the same extent as in England a man might bind himself by the so-called contract under seal—which, incidentally, if Grotius' reasoning were sound, could create no enforceable obligation.[202] The unilateral promise provides solutions to problems that cannot conveniently be resolved by the offer and acceptance model. Indeed,

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[198] *Idem*, n. 10.3, p. 91-2.

[199] *Idem*, n. 10.4, p. 92.

[200] "…This also quadrates with the nature of a right, which consists in a faculty or power which may be in these, who exerce no act of the will about it, nor know of it; so infants truly have right as well as men, though they do not know, nor cannot exerce it." *Idem*, n. 10.4, p. 92. The existence of rights, Stair argues, not only depends on the right holder's will.

[201] MacBryde, *op. cit.*, p. 56.

[202] TB Smith, "Pollicitatio…," *op. cit.*, p. 147. (Though on p. 149 Smith goes on to complain that the unilateral promise is not being used in advertisement cases as Scottish courts have a tendency to assimilate the English approach).

> All legal systems wish to recognize, in some types of circumstance, the efficacy of such unilateral promises, but they often do so by forcing promise to wear the borrowed clothing of contract. This not only distorts a proper understanding of contracts, but it displays a lack of honesty about why liability is being imposed, for the reality is that it is being imposed because the promisor has unilaterally bound himself by his declaration of will to undertake a specific performance. Nothing else is needed by way of explanation, and attempts to explain liability by reference to fictional acceptances of such promises, or by an assertion that it is detrimental reliance which is being protected, are an unhelpful and misleading addition.[203]

3.1.4. THE CONCEPT CALLED UNILATERAL PROMISE

It would be unreasonable to assimilate the works of Siegel, Worms and the Scottish institutionalists, but we can certainly relate them on three significant points.

First of all, these works share a practical interest. The unilateral promise scholars do not get into questions like whether someone could commit to a promissory obligation by internally intending it, as the Salmantine scholastics did.[204] The cases they tackle are of firm offers, promises of a reward, titles of credit, stipulations for the benefit of a third parties, gratuitous promises, and in general, cases where the recipient of a promise had neither requested it nor had the opportunity to accept it. They see conflicts of interest in interactions for which their legislation has no solution. The concepts of "Versprechen," "declaration unilateral de volunté" or unilateral promise are constructed to offer a response to issues arising in *interactions* between persons.

Secondly, they present their solutions in the form of another cause or source of obligation. They do not elaborate the new concept in the context of a new law, as was arguably the case with the Canon lawyers, who built their concept of *promissio* in the context of a law dedicated to inducing the faithful towards a path to salvation. [205] The unilateral promise

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[203] Martin Hogg, *Promises and contract law: comparative perspectives*, Cambridge University Press, Cambridge and New York, 2011, at 109.

[204] See discussion in James Gordley, *The philosophical origins of modern contract doctrine*, Oxford University Press, New York, 1991, p. 79 and ss.

[205] Medieval Canon lawyers have argued that a promisee could, based on the Canon law rule against perjury, demand performance to the non-performing promisor. See the authors quoted in Enrico Dell'Acquila, "La promesa unilateral como fuente general de obligaciones," in *Revista de Derecho Privado*, Tomo LXIII, (1979), Madrid, pp. 796-806, at n. 6 pp. 803-804, Enrico Camillieri, *La formazione unilaterale del rapporto obbligatorio*, Giappichelli, Torino, 2004, p. 4-7 and Reinhard Zimmermann, *The Law of Obligations*, Oxford, 1996, p. 542-544. I believe that whether canon law demanded the enforcement of promises or not is irrelevant for private law. Canon law is categorically different to private law. One has to do with the salvation of the soul, and the other with transactions between equals. Conf. Guido Astuti,

scholars write to their respective private laws. They wanted their laws to recognize their unilateral promise and they wanted such recognition to be made in *the same form* as the contract and the tort. Not as a contract, neither as a tort—but as that which defines contract and tort. They wanted private law to recognize the unilateral promise as a general category for identifying obligations in interactions. The most eloquent example of this can be found in Worms' book, in clear reference to the classification of Art. 1370 of the French Civil Code—"The unilateral declaration of will as a source of obligations." Another clue as to the engagement of these scholars with the private law tradition lies in their noticeable concern with replying to arguments contrary to their own positions. Hence, Stair engages with Grotius, and Siegel with the German followers of Roman law.

Finally, and probably most importantly, these scholars defined promise in precisely the same way. First, it is paramount for them all that promise be the external manifestation of the promisor's will. This is to say, promise is a declaration. Second, it is a means by which one can obligate oneself to do something for the benefit of another regardless of the beneficiary's consent, promise is a unilateral act. Third, valid unilateral promises have a complete and licit object. A promise concerning things extra commercium would for example be void. Fourth, these writers explicitly or implicitly divide the effect of a promise in two; the duty that immediately and necessarily arises from the promise, and the obligation that could eventually mature. The obligation is a duty to do something at the request of another, and it matures where the promisee performs the deed with which the promisor conditioned the exigibility of the promise.

"Contratto (dir. interm.)," in *Enciclopedia del Diritto*, t. IX, Giuffrè, Varese, 1961, pp. 759-784, at n. 9., pp. 774-6.

3.1.5. RECEPTION BY AN INTERNATIONAL PRIVATE LAW: ART 2:107 PECL

The Principles of European Contract Law,[206] "taken to constitute a general conceptual and systematic foundation for the process of the harmonization of European contract law[,]"[207] prescribes, in Article 2:107, that:

> A promise which is intended to be legally binding without acceptance is binding.

I want to elaborate three points. First of all, the new concept appears under a proper name—"unilateral promise."[208] This is in an important fact, for in the culture of private law, the rules, concepts or principles with a name of their own are the institutions of the private law.[209]

Second, the unilateral promise appears as a cause of obligation. Although the principles of European contract law are principles of contract law, they include the concept of unilateral promise, and include it as an alternative to the contract. The unilateral promise is an alternative to the contract in that it does the same thing. Contract is a model for forming obligations. Two persons form an obligation when one accepts the offer of the other. The unilateral promise is another model for forming obligations. One person, by her own will, can obligate herself to do something for the benefit of another. The concept of unilateral promise is there to give legal representation to the cases that do not fit with, or as many unilateral promise scholars like to say, cannot be explained by, the offer and acceptance model.[210] Undoubtedly, it would have been desirable for the unilateral

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[206] Ole Lando and Beale, Hugh, *Principles of European contract law*, Parts I and II, (prepared by the Commission on European Contract Law, chairman, Ole Lando), Kluwer Law International, Boston, 2000.

[207] "The PECL may be taken to constitute a general conceptual and systematic foundation for the process of the harmonization of European contract law. In particular, however, they offer a neutral reference point for an organic assimilation of private law – one which can serve (and does, indeed, increasingly serve) as a source of inspiration for the traditional agents of legal development in Europe: legislators, judges, and professors." Reinhard Zimmermann, "The Principles of European Contract Law," in Florian Faust and Thüsing, Gregor (eds.), *Beyond Borders: Symposium in Honour of Hein Kötz*, Heymanns, Köln, Berlin and München, 2006, pp. 111–48, at p. 141.

[208] The name unilateral promise appears in Art. 1:07, which says that the Principles apply with any appropriate modifications to "unilateral promises and to other statements and conducts indicating intention."

[209] The tradition of naming concepts goes back to Roman times, where only the contracts with names were enforceable, like "stipulatio", "commodatum" and "emptio-venditio." The innominated contracts were, in principle, unenforceable. This could be said of all the situational cases that gave right to an obligation, see Max Kaser, *Derecho romano privado*, 5th ed, José Santa Cruz Teijeiro translation, Reus, Madrid, 1968, §33, p. 1.

[210] The same can be inferred from the place in which the unilateral promise is mentioned. Article 2:107 precedes the section on "offer and acceptance," and is included in a section with general provisions on the formation of voluntary obligations, like Conditions for the Conclusion of a Contract, Intention, Sufficient Agreement, Terms Not Individually Negotiated and Merger Clause and Written Modification

promise to appear in a chapter of its own, but the PECL's treatment is justifiable in that it is not a book on obligations.[211]

Finally, as in Siegel, Worms and the Scottish institutionlists, the unilateral promise is a practical concept. It is there to ground the cases that cannot be explained by the offer and acceptance model. Page 157 of the PECL mentions two cases:

First, a fake gratuituous promise:

> Illustration 1: When the Gulf War started in 1990 the enterprise X in country Y published a statement in several newspapers in Y promising to establish a fund of 1 million Euros to support the widows and dependent children of soldiers of country Y who were killed in the war. After the war X tried to avoid payment, invoking big losses recently made. X will be bound by its promise.[212]

Second, a letter of patronage:

> Illustration 2: C sends a letter to the creditors of its subsidiary company D, which is in financial difficulties, promising that C will ensure that D will meet its existing debts. The promise is made in order to save the reputation of the group of companies to which C and D belong. It is binding upon C without acceptance since it is to be assumed that C intends to be bound without the acceptance of each creditor.[213]

The Principles of European Contract law was meant to elaborate a "set of general rules which are designed to provide maximum flexibility and thus accommodate future development in legal thinking in the field of contract law."[214] The arbitrator, as "the Court" or any other user of the principles, "may adopt the solution provided by the Principles

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Only. Moreover, Art. 1:101 provides that the articles on contract formation could be applied to unilateral promises. In doing so, the PECL relates and differentiates contract from unilateral promise.

[211] The comment to the rule begins like this "An offer is a promise which requires acceptance. An offeror is not bound by its promise unless it is accepted. Other promises are binding without acceptance and they are nevertheless to be treated as contracts albeit with some modifications." The statement "the promise must be treated as a contract" must not mislead the reader. This does not mean that, in the PECL, the unilateral promise is a kind of contract. The PECL is a good private law book. In our tradition, we utilize these fictions when we recognize that a relevant legal phenomenon is similar to a sophisticated legal institution but yet is different enough that we might not characterize it as a species of the other. In these scenarios we describe the legal phenomenon in question with a degree of license, using what some call techniques of analogy. The jurist can avail himself of the rules of the sophisticated institution, always minding the fact that he is ordering a new creature, that the case at hand only shares a similarity with the source of inspiration.

[212] Ole Lando and Beale, Hugh, *Principles…*, *op. cit.*, p. 157.

[213] *Idem*, p. 157.

[214] *Idem*, p. XXVII.

knowing that it represents the common core of the European systems."[215] The writers admit that the project sometimes allows the solution of one European system to prevail over another, or invents new solutions. This attitude is characterised as "progressive development." [216] Article 2:107 is "interesting and innovative,"[217] without doubt. The question I want to pose is whether it is just. Is Article 2:107, and the theory encapsulated therein a progressive development of just private law?

3.2. TODAY'S UNILATERAL PROMISE IS NOT A PRIVATE LAW CONCEPT

I will submit two criticisms of the standard conception of unilateral promise. Both are elaborated from the perspective of just private law.

3.2.1. TODAY'S UNILATERAL PROMISE MISSES THE OTHER PERSON OF LEGAL PHENOMENA

According to the standard version of the unilateral promise, a person becomes obligated by her promise provided that she declared her irrevocable intention to be obligated to do something and the object of the obligation is licit and complete. I want to note that this mode of conceptualizing the unilateral promise implies the following normative possibility: A person would become obligated to do something before, or regardless of the fact that the promisee takes notice of the promise.[218]

This possibility is implicit in the wordings of Parr 2:107 of the PECL,[219] and is explicitly endorsed by some unilateral promise scholars. In the case of stipulation for the benefit of a third party, according to both Siegel and Worms, A grants the benefit of a right to C by declaring a promise to B. C acquires the benefit even if he or she ignores A's promise. Martin Hogg, a Scottish institutionalist writer, opines the same in the case of the promisee

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[215] *Idem*, p. XXIV.

[216] *Idem*, p. XXIV, note 6.

[217] Nils Jansen and Zimmermann, Reinhard, "Contract Formation and Mistake in European Contract Law: A genetic Comparison of Transnational Model Rules," in *Oxford J Legal Studies*, Vol 31, No 4, (Winter 2011), pp. 625-662, at p. 17.

[218] Other unilateral promise norms do not incur in this *first* error: "La promessa unilaterale, se fatta per scritto e per una durata non indeterminata, obbliga il promittente tostoché sia giunta a notizia della persona cui è destinata, a meno che questa rifiuti." Commissione Reale per la Riforma dei codici – Commission française d'etudes de l'union legislative entre les nations alliées et amies, *Progetto di Codice Italo-francese delle obbligazioni e dei contratti*, (Testo definitivo approvato a Parigi nell'Ottobre 1927), Roma, 1928, Art. 60.

[219] It only says "A promise which is intended to be legally binding without acceptance is binding". Although the commentary states "The promise must of course be communicated to the promisee or to the public." Ole Lando and Beale, Hugh, *op. cit.*, p. 157.

of a promise of reward performing the requisite activity in ignorance of the promise.[220] This version extreme of the theory was made private law in Germany and England.[221]

I want to shed light on the fact that this normative possibility stands in manifest incoherence with the other branches of private law liability, or causes of obligations.

Indeed when we study the traditional causes of private law obligations we see that the party who becomes a debtor interacts with the party who becomes a creditor. Tort is possibly the best example to illustrate the "relational aspect" of the causes of the obligation. In tort, the relation manifests itself in the requirement that the wrong of the tortfeasor in fact damages the victim. Car accidents, batteries and libels vividly portray the connection between debtor and creditor. The fast car, long hand or adverse comment of one caused the broken leg, black eye or reputational damage of the other. The idea is that the creditor suffered damage because the debtor illegally provoked its effective cause. It would be very difficult for a private law practitioner to argue that a person is responsible for the damages that another person suffered if he or she is unable to prove that the alleged debtor acted, by herself or through someone under her control, in a manner conducive to the cause of the damage. Tort systems that depart from this mode

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[220] "The conceptual benefit of seeing such promises of reward as unilateral promises is that the obligation is properly recognized as coming into being immediately upon the promisor's intention to be bound is objectively communicated (rather than when accepted in some way) and that it can be enforced by a promisee even if he was unaware of the reward when he performed the stipulated conduct." Promise Hogg, "The Neglected Obligation in European Private Law", cit., p. 470. Criticizing Scots law's tendency to assimilate reward cases to the English law, T.B. Smith expects Scots law, which has accepted a general doctrine of obligation by unilateral declaration of will, to treat reward promises like the German law, which grants a right to ignorant performers. T.B. Smith, "Pollicitatio - Promise and Offer, Stair v. Grotius," in *Acta Juridica*, 1958, (1958), pp. 141-152, at p. 149.

[221] §657 of the German Civil Code (BGB) prescribes: "A person, who by public notice announces a reward for the performance of an act, in particular for the production of a result, is bound to pay the reward to any person who has performed the act, even if he [the latter] did not act with a view to the reward". See discussion in 2.4.3.1. In the common law, the extreme was made law in *Williams v Carwardine*, (1833) 5 C. & P 566; 4 B & Ad. 621, where the act conditioning the exigibility of the promised performance (£20) was provision of information leading to the discovery of the murderer of the promisor's brother. Whether the information had been proffered with a view to the £20 reward, or whether it had been due to the moral affliction caused by the fact that the murderer was the husband of the plaintiff was irrelevant for the courts. What mattered was that the plaintiff provided the requested information. "18. Mr. Justice J. Parke. If the plaintiff comes within the conditions of the handbill, I think she is entitled to the reward. The jury will probably find that the £20 was not the motive. We may, I think, assume that it was not. The motive was the state of her own feelings. My opinion is, that the motive is not material; and that, if she comes within the terms of the handbill, that is sufficient." Thereby the "Verdict for the plaintiff-Damages £20." "20. […] It is to be taken as found by the jury, that the plaintiff gave the information which led to the discovery of the murderers; but that she did not give that information for the sake of the £20 reward, nor in consequence of the handbill, but from stings of conscience."

of building tort claims depart, at the same time, from the classical mode of justifying private law obligations.[222]

Let me pass over the case of contract to make a more illuminating comparison. It is probably only in the case of unjust enrichments that a party ignores the event that engages her in an obligation with another. For example: strong rain ruins my house's fence and I am on holidays, my neighbor cannot contact me and yet decides to fix it. I am obligated to restitute to him the value he spent to my benefit. Another example: the phone bill arrives home and I am on holidays, the cleaning lady finds it unnecessary to bother me and decides to pay these debts for me. Once again I am obligated to make restitution of the expenditures. In these cases I become obligated to someone by a fact that I ignore. Now, if we accept that someone may become a debtor while ignoring the causative event, Siegel, Worms and the Scottish institutionalists could say, we must also accept that someone may become a creditor while ignoring the causative event. The unilateral promise, like the *negotiorum gestio*, features a person who becomes enriched without having a contract with the impoverished party—I make the promise, it does not reach you, and yet you become enriched. Is this a correct analogy?

No, it is not. The analogy does not obtain because the gestor of the *negotiorum gestio* does make contact with the *dominus negotii*. Even if I am absent while you are fixing my house's bench, even if I ignore the fact that you are paying my debts, your agencies are nevertheless interfering with my personality. For my house and debt are parts of my belongings—they are like extentions of my being. Here the relational aspect manifests itself in the fact that the enriched and obligated person received value from the impoverished person, or automatically accrued it after of the latter's deed. Nothing like this happens in the case where someone makes a promise that never reaches the promisee.

My argument can be formulated like so: If we want to construe the unilateral promise as a cause of obligation, then the unilateral promise must look like the tort, the unjust enrichment and the contract, which are the existing causes of obligation. The standard definition of unilateral promise makes no reference to the interaction between the person who is to be the debtor and the person who is to be the creditor, which seems to be a basic feature of all causes of obligation. Thus, I conclude, the standard version of the unilateral promise cannot qualify as a cause of obligation.

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[222] It goes without saying that the wrongful interference of the creditor must cause damage to the content of the debtor's *right*. And so, the broken leg in our example amounts to harm because the leg's indemnity is part of the object of the creditor's right against the debtor. See Ernest Weinrib, *Corrective Justice*, Oxford University Press, Oxford, 2012, p. 20 and the discussion in 4.1.3.2.

A. Von Werner, Die Proklamation Des Deutschen Kaiserreiches (1877)

Business certainty, the circulation of property, the firm, trust, good faith and assurance: Goals and values needed by an emerging state that wills to become an industrial power. Law as the general rule established by the authority makes it possible. Civil codes' private laws are more political than juridical achievements. The difficulty involved in the task of creating law under the presupposition that law is a coercively enforced general rule has to do more with calculating how to most effectively advance the authority's agenda than with finding a form that states the justice of cases.

1. Die Proklamation des Deutschen Kaiserreiches **by Anton von Werner (1877), depicting the proclamation of the foundation of the German Reich (18 January 1871, Palace of Versailles). Left, on the podium (in black): Crown Prince Frederick (later Frederick III), his father Emperor Wilhelm I, and Frederick I of Baden, proposing a toast to the new emperor. Centre (in white): Otto von Bismarck, first Chancellor of Germany, Helmuth von Moltke the Elder, Prussian Chief of Staff. Source: https://en.wikipedia.org/wiki/German_Empire**

2. Bürgerliches Gesetzbuch 1896 in https://de.wikipedia.org/wiki/Bürgerliches_Gesetzbuch

The same conclusion can be reached from the perspective of the concept of private law obligation: An obligation is a sort of necessity that someone does something. For someone to be obligated by private law, there must be a person to whom the something is owed, or who has the correlative right to request the owed performance.[223] In other words, for you to be obligated, another like you must have a right as against you. This right of mine as against you amounts to a belonging of mine, an extension of my personality. From the moment I have a right as against you, I have a new power of action—the possibility to request of you the object of your duty. It follows from this that before I had this new power of mine I must have had an encounter with it, otherwise I would never have had that right. The right depends for its existence on its addition or attachment to me—the metaphor of the acquisition or reception of the personal right applies. This meeting may be involuntary; I did not decide to acquire the promised right. However it needs to meet me, as when someone acquires a power to accept an offer by *learning* of the offer. Otherwise there is no extension of my personality.

We see that becoming a creditor requires an act, and that such an act must consist in a relation in between the debtor and the creditor. A promise, like any phenomenon that is to be considered a cause of obligation, needs to be relational. The jurist who wants to build promise as a cause of duty-right relations must be ready to specify the factual conditions under which the promisee takes the (credit which is the) correlative of the obligational duty. Otherwise there can be no basis for liability. A promise that does not interfere with a promisee cannot be an effective cause of private law obligation.

3.2.1.1. Am I missing the point?

Still, Siegel, Worms and the institutionalits could respond that I missed the point of their theory. What follows from a unilateral promise is not an obligation in the classical private law sense. It is not a duty correlated with a right. The immediate outcome of the unilateral promise is a duty of the promisor to keep her promise. From the moment she states the promise she is obligated to act in accordance with the order established by the promise. Since the promise creates a legal scenario where someone is a beneficiary, this someone can enjoy this benefit if he or she so desires. But this someone does not participate in the creation of the private legal order. This order emerges from the unilateral will of the promisor. Therefore, it is immaterial whether the beneficiary knew of the promise when he or she performed the activity that was established as the condition for the reward. His or her agency takes relevance only after he or she is in a position to decide whether to

[223] The famous definition "Obligatio est iuris vinculum quo, necessitate, adstringimur alicuius solvendae rei, secundum nostrae civitatis iura." Justinian, Institutes, I. 3,13 Pr.

claim the granted benefit, and decides to do so. Only then does the beneficiary become a creditor, and the promisor a debtor in the private law sense.

This theory has great explanatory capacity. It helps us to justify the obligations of various types of undertaking, like the various interested promises, the stipulations to the benefit of a third party, the testament and the bequest. However, the theory of the legal effect of non-communicated promises is incomplete and I cannot imagine a way to complete it without defying basic tenets of private law.[224]

The question to be answered is: Who holds the promisor to her promise in the interval between the declaration of the promise and the advent of the creditor? One answer is "no one"—there is no such person. [225] However, if I am obligated to do something without a party in favour of whom I am obligated, whether I do what my duty requires is left up to me. We are at pains to argue that my duty is legal. We need someone who could demand compliance in the eventuality that the promisor tried to revoke before the creditor enters

[224] This criticism seems to have already been made in Siegel's times: "…the thesis of Siegel, that the promise derives both a duty to keep the word and a duty to perform the promise, has been significantly objected on the grounds that the first duty has no juridical character and therefore the second no effective relevance…" Bernhard Windscheid, *Diritto delle pandette*, Carlo Fadda and Paolo Emilio Bensa translation, Torino, UTET, 1902, §304, p. 179, note 12.

[225] Some could reply that even duties to oneself have creditors. For example, when I was committing myself to finishing my PhD, I was implicitly unfolding myself into two - promisor and promisee. This view is persuasive. However, I am tempted to think that one could be obligated without a creditor. I, without a doubt, could meaningfully think that I am obligated to do something (full stop). I think that what is good is to do whatever a reasonable individual would think due in the given circumstances, and, in endorsing this formula and applying it to my desired plan, constrain myself to do some certain thing. For example, I believe that everybody would agree that long projects are to be completed once they are considerably developed unless exceptional circumstances impede completion and, in view of this, commit myself to finishing my doctoral dissertation. Nothing, not even the idea itself, can claim to be the creditor of my obligation to finish my PhD. Though being obligated conceptually requires the obligated party to do something, the creditor is not a conceptual requirement for obligation in its general sense. Here the words of Radbruch are pertinent:

> Il dovere morale è dovere verso la coscienza, verso il migliore io, verso Dio nel proprio petto, o comunque noi possiamo esprimere con perifrasi il fatto che esso viene ascritto solo alla legge morale, non a qualsiasi altra forza che ordini e pretenda.

Gustav Radbruch, *Introduzione alla scienza giuridica*, Dino Pasini and Carlo A. Agnesotti translation, Giappichelli, Torino, 1961, p. 83. For a discussion of the curious case of self-promises see Stan Husi, "The importance of self-promises," in Sheinman, Hanoch (ed), *Promises and agreements: Philosophical Essays*, Oxford University Press, New York, 2011.

on to scene.[226] The best candidate seems to be the state.[227] If I make a promise, I am obligated to the community as a whole. It is the community who will reproach me in a case of non-compliance. Even if my promise points to you as the beneficiary, I am not obligated as against you but to the community as a whole, which will ensure that I keep faith with my promise and that you enjoy the benefit thereby established for you. But in this scenario you are not a promisee, properly speaking you are a beneficiary of my undertaking. For the same reason, you do not hold a right of action in reproach of my non-performance of the undertaking. The holder of the right of action is the community, which, as the entity entrusted to make me meet the terms of my promise, holds this right as someone that has no choice other than to demand performance. The community cannot renounce the right of action. Moreover, as the action against the promise's non-performance is a public action, the holder of the action must prosecute me in any case of non-compliance. The state has to do it more as a matter of duty than as a matter of interest, even where there is no private person interested in my promise. I do not think that the unilateral promise scholars are ready to accept such an extreme view of their theory.[228]

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[226] Once again, Radbruch: "Solo quando Eva si presentò ad Adano, Venerdì a Robinson, per essi cominciò, accanto alla morale, ad essere valido anche il diritto. La legge morale vale per l'uomo nel suo isolamento, effettivo o pensato, la legge giuridica per gli uomini nella loro convivenza, per la comunità umana." Introduzione…, cit., at 85. Contra: the suggestive view of Fernando López de Zavalía, *Derechos Reales*, Zavalia, Buenos Aires, 1989, t. 1, Capítulo 1, §2 esp. VI-VII, who argues that Robinson had rights before Viernes' arrival to the island.

Once again, for my obligation to be legal someone must have the choice to demand my compliance in case of incompliance. And it is obvious that someone must know of this entitlement for her to be able to demand this of me. Otherwise the possibility of reproach never existed. And if you happen to know of my promise after I have regretted having made it, then you cannot claim something against me, for you have learned of a revoked promise.

[227] Here an almost poetic view of the public law conception of contractual obligation:

> The true is that all obligation, contractual or not contractual, arise, among all, of one high and deep unilateral will: that of the lord; be it hereditary or semi-divine, be it an elected, profane lord legislating at his will. Thus the only origin of the obligations formed without contract. As to the conventional obligations, they arise primarily out of this grand unilateral will called public authority, and then, of the petite unilateral will of every contractual party that, reflecting that external and superior commandment and in conformity with their given latitude, *commands himself*, both lord and subject, *and commands himself obedience of the commandment of the other*."

Gabriel Tarde, *Les transformations du droit: étude sociologique*, F. Alcan, Paris, 1893, p. 123. See 6.1., where I explain why this conception of contractual obligation cannot be a private law conception of contractual obligation.

[228] Once they have accepted this extreme, they must, of necessity, neglect the division between private law and public law. (See the interesting reflections of Weinrib, *Corrective Justice*, *op. cit.*, Chapter 9, 2, b), pp. 306-312, especially at pp. 309-10.) Some simply cannot do it, for they use the private law/public law dichotomy in their argumentation. Worms, for example, maintains that the pollicitatio and the votum belong, properly speaking, not to the private law but, respectively, to the Roman public law and the Droit sacré. See René Worms, *De la volonté unilatérale*…, op. cit., at p. 83.

Indeed nor am I, as someone interested in determining a new private law transaction, ready to establish a solution of such kind.

3.2.2. TODAY'S UNILATERAL PROMISE MISSES THE RECIPROCITY OF JUST PRIVATE LAW OBLIGATIONS

Now I want to talk about the fact that the legal order that recognizes the standard conception of unilateral promise is a legal order for which purely charitable promises confer enforceable rights. Neither Siegel nor Worms attended to this implication of their unilateral promise. However one of the Scottish institutionalists is especially emphatic on this point. Martin Hogg says:

> Promise is capable of offering a suitable explanation of unilateral undertakings to effect a donation.[229]

I want to suggest that, without its own version of the idea of cause or reciprocity of the obligation, the unilateral promise cannot present itself as a cause of obligation. Indeed, in their own way, all causes of obligation manifest the reciprocity requirement. [230] Contract does this through its requirement of cause or doctrine of consideration.[231] The accepter

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[229] Martin Hogg, *Promises and contract law…*, *op. cit.*, p. 465, where he lauds the *European Draft Common Frame of Reference*, which, in the num. 56, entitled "Minimal substantive restrictions" says:

> The absence of any need for consideration or causa for the conclusion of an effective contract, the recognition that there can be binding unilateral undertakings and the recognition that contracts can confer rights on third parties all promote efficiency (and freedom!) by making it easier for parties to achieve the legal results they want in the way they want without the need to resort to legal devices or distortions

"This principle, [suggests Hogg], correctly identifies personal autonomy and efficiency as two strong reasons for recognizing both unilateral undertakings and third party rights (other manifestations of promise might similarly be justified), and the avoidance of distortion of the law as a strong reason for not forcing transactions to adopt inappropriate legal forms in an attempt to avoid structural barriers to validity. It is encouraging to see the drafters of the DCFR adopt this view, as it aligns with what has been argued throughout this work." Martin Hogg, *Promises and contract law…*, *op. cit.*, p. 466.

[230] In this sense, "ogni prestazione, attribuzione patrimoniale, o spostamento di ricchezza che dir si voglia, deve essere sorretto da una adeguata giustificazione, che ne costituisce la *causa*" Francesco Di Giovanni, *Le promesse unilaterali*, CEDAM, Padova 2010, p. 64

[231] For the common law see Peter Benson, "The idea of Consideration," in *University of Toronto Law Journal*, Vol 61, No 2, (Spring 2011), pp. 241-278.

Three points of the French Civil Code indicate that voluntary obligations are only about agreed exchange. Firstly, donations are not regulated among the sources of the obligation; they are regulated before them, together with testaments (Title II: Of donations during life and of wills) and after of the mortis causa succession (Title I). Secondly, there is Art. 931 requiring that "All acts importing donation during life shall be passed before notaries", this is the State intervening to render the agreement enforceable. And finally, even if the general definition of contract in Art. 101 seems to suggest that the contract could be gratuitous, there is Art. 1131, which says that to obligate, the obligation must have a lawful causa: namely, consideration on the eyes of the law.

The same cannot be said of the German BGB, which does not talk about causa because its law of contract is a reflection of the pandectists' theory of contract, and these authors neglected the concept of causa

of a contractual offer owns the obligation not only because the offeror offered it to him, but also because acceptance implies giving to the offeror the thing for which the offeror offered the obligation. Acceptance can signify contracting a synalagmatic obligation, transferring an *in rem* right or performing some certain act. Whatever the case, something must always be given in exchange. We will return to this in 4.1.4. and 5.2.2.1.

Curiously enough, tort evinces the same idea of reciprocity. The case of negligence is illustrative. If fast driving causes harm to another, the driver is responsible not only because she crashed into the other person but also because driving fast signified taking what belongs to that person. What belongs to them in this case is the freedom to traverse public spaces without concern for the threat posed by fast drivers. What the driver gains is the cost that an otherwise diligent person would have paid in the same circumstance: (time and attention devoted to exercising due care, driving cautiously.) The harm to the victim is the loss of something that she owned before the tort occurred. The wrong of the tortfeasor is not only the causal antecedent of the victim's harm but also the reason by which the tortfeasor must pay for the harm caused to the victim. Requiring that the harm of the victim be caused by a wrong of the tortfeasor signifies that the tortfeasor was enriched, as it were, with the effectuation of the wrong. Wrong, in private law, is "something like the self-seeking indulgence of passion."[232]

In proving that the agreement had consideration and that the tort was wrongfully caused, the contractual creditor and the tort victim prove the justice of their case.[233] The same goes for cases of unjustified enrichment: I have a claim to restitution because you enriched yourself at my expenses without my authorization. In stark contrast, however,

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and consideration. They derived the contractual obligation from the creative force of individual wills. (See Paolo Recano, "Profili storici della promessa unilaterale," in *Rassegna di Diritto Civile*, fasc. 1, (2006), pp. 168-223, at p. 201, note 101.)

[232] Sir Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law*, 4th ed., Stevens and Sons, London, 1895, p. 9. Also the interesting opinion of Pufendorf:

> in case a Man be hurt or injur'd by another, in any respect, the Person who stands justly charg'd as Author of the Wrong, ought, as far as it lies in his Power, to make Reparation. For otherwise it would have been a vain Command not to harm another, if the Party who actually suffers such a Harm, must be content to put it up without farther Notice, and leave the Offender to enjoy in Peace the Fruit of his Injury, never obliging him to refund, or to restore.

Samuel Pufendorf, *Of the law of nature and nations*, Basil Kennett translation, printed for J. Walthoe, R. Wilkin, J. and J. Bonwicke, S. Birt, T. Ward, and T. Osborne, London, 1729, Book 3, Ch 1, num. 2, p. 214 (emphasis omitted).

[233] "[…C]orrelativity marks the character of private law as a distinctive normative order. No justification that does not participate in this character can find a coherent place within private law. Correlativity accordingly excludes considerations, no matter how appealing, that focus unilaterally on one or the other of the parties…" Ernest Weinrib, *Corrective Justice*, *op. cit.*, p. 316.

the creditor of a unilateral promise is not expected to prove the justice of his right. The promisee can be said to have acquired a right as against the promisor by virtue of the promise alone, as the standard conception of unilateral promise grounds the promissory obligation only on the fact that someone manifested the will that she be obligated.

A concept that aims to stand as a cause of obligation must work out its own specification of the reciprocity requirement. The lack of this requirement, from a juridical perspective, troubles the justifiability of the unilateral promise. Let me demonstrate the unappealing character of the unilateral promise explanation with the hypothetical case offered in the following title.

3.2.2.1. How could a promisee argue that a promisor is obligated under art 2:107 PECL?

The Principles of European Contract Law are a scholarly set of private law principles, rules and concepts. There is no authority with effective coercive power behind these rules. If you make a contract invoking these principles, if you and your contracting party agree that your contract will be governed by the Principles of European Contract Law, you could respond to your partner's reticence to behave according to the PECL's default rules by saying, "You agreed to order all conduct relatable to our contract in accordance with the PECL's default rules." Can you utilize this argument against a promisor who invoked the principles but revoked the promise before you claimed performance? Suppose that the promise you received said something like "the present promise and all its relatable scenarios will be ordered in accordance with the PECL." The promisor revokes the promise before you accept it and you claim breach of promise. For that you invoke Art. 2:107 of the PECL. You are basically saying that since she wanted to be obligated by her promise she should be obligated to honour this promise. She replies that you have not submitted yourself to the same legal regime, that before you did so by claiming performance, she revoked her promise and her own subjection to the PECL. What would you say? "Your unilateral promise implied within it a unilateral commitment to the PECL?" Another, more powerfull rejoinder would be, "Well, right, I did not submit to these principles expressly, but in receiving your promise, I gave something to you—the value of the chance that I would do as you wanted." (See part 5) In the absence of consent, the argument that the promisor got something from the promisee due to the promissory transaction itself gives much more weight to the claim for performance made by one party to another in a state of nature scenario.

3.2.3. SOME REMARKS AS TO THE CONCEPT'S JUSTIFICATION

The unilateral promise scholars see that their respective laws do not recognize promise as a cause of obligation. Discontented with their laws, they look for a theory that could explain the obligation of promise. Siegel reverts to the Germanic laws, Worms to some form of sociology, and the Scottish institutionalists to their historical law. Notwithstanding their diversity, they eventually converge on the same idea of the autonomy of the will. Sooner or later the commonplace justification becomes the doctrine of the autonomy of the will. I want to say something about this mode of justifying promises in private law.

3.2.3.1. ON THE DOCTRINE OF THE AUTONOMY OF THE WILL AS A MODE OF JUSTIFYING LEGAL CONCEPTS

The principle of autonomy of the will holds: Do whatever you want insofar as the maxim with which you ordered your conduct could be elevated as a universal law of action.[234]

We can be governed by this principle because, as goes without saying, we recognize ourselves as the authors of our own conduct. We believe that every conscious action that we take is a reflection of a previous intention to so act, however vague or imprecise. And we intended the conduct that we effected because we, and none other than we, chose and combined the maxims or patterns with which we internally elaborated (projected) our conduct.

Those who test maxims for action in the laboratory of the principle of the autonomy of the will are the moral scientists. It is these moral scientists that must have approved the maxim on promise. They might have evaluated whether a maxim saying "Do what you promise," could or could not be elevated as a maxim for the moral life of all purposive being, and concluded for or against such elevation. Moralists hold that the maxim on

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[234] Why have we decided to be governed by the golden rule of autonomy? Reason has shown us that there is no better principle than autonomy and therefore we postulate it as the rule of production for the maxims of our moral life. The reasoning is this: we all are free and like to be free. But sometimes our freedom confronts us. As we have reason, we ask this question: How could we be free without conflict? We will be free without confrontation if we are free while congnisant that other free beings want to be free too. So let us do what permits us to be free in harmony with others.

I have elaborated all these reflections based on my readings of Immanuel Kant, *Groundwork for the metaphysics of morals*, Allen W. Wood translation, Yale University Press, New Haven, 2002 and Immanuel Kant, *Critique of practical reason*, Mary Gregor translation, in *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy*, Cambridge University Press, Cambridge and New York, 1996.

promise—we can call it "the duty of fidelity" —is indeed a moral maxim; hence your duty to do what you have promised.

We must do what we promise, and not doing what we promise is a breach of the promise and of the maxim on promises. Here the breach of a promise is not harming another person, taking what belongs to another or frustrating the expectations of others. Here breaching a promise means disrespecting one's own autonomy. Disrespecting one's owns autonomy? Aren't we talking about the maxim on promise? Since the maxim was determined by the principle of autonomy, breaching the maxim on promises is, at the same time, disrespecting autonomy. So when one violates one's promise, one is breaching three things: the promise, the maxim on promises, and the principle of autonomy.

But if we must do what we promise because promise is a maxim of autonomy, we must also do what the other maxims of autonomy request, for what is ultimately cherished is the principle of autonomy. And if we think that the maxim of promise is a legal maxim, we must also think that the other maxims of autonomy are legal maxims, for if we follow this sort of moral reasoning we also follow Reason, and reason is coherent. In other words, where we legalized one maxim of autonomy with the argument that its breach is a breach of the source of our moral freedom, then someone may have reason to ask: But why is X a maxim of autonomy and not Y? The preeminent question for those who think like moralists and talk about law is this:

If one has to do what one has promised because autonomy says so through its maxim on promise, how can we avoid following the other maxims of autonomy, like:

do not lie,

be faithful to your lover,

be punctual,

etc. etc. etc.?[235]

The autonomy jurist must be ready to jettison the requirement of actual damage from tort.

The unilateral promise scholars look for a theory that explains the obligation of promise. Having found it, and explained the obligation of promise, they postulate the theory as a

[235] I refrain from listing maxims that have to do with conduct in respect of ourselves, like exercise, do not smoke, and so on and so forth.

legal theory. My method differs. I look for a theory of private law in conditions in which I could elaborate the obligation of promise. I look for a theoretical commonality shared by promise and the other causes of obligation. Given our private law, how and to what extent could we incorporate the social practice of promise?

I would like to finish this discussion quoting Gino Gorla's words on the principle that simple promises obligate in private law:

> In realta un simile principio sarebbe cosi poco pratico, cosi poco giusto, che nessun ordinamento moderno é arrivato, almeno per la promessa non formale, ad accoglierlo, salvo alcuni casi eccezionali. Impegnare una persona verso qualcuno, per la parola, per la semplice pollicitatio, senza che questo qualcuno abbia mostrato, in qualche modo, di farvi affidamento, sembra quasi assurdo.[236]

3.3. SOME LESSONS LEARNED FROM THIS DOCTRINAL FAILURE

We can draw some useful conclusions from the study of the unilateral promise scholarship.

First of all,

3.3.1. WE COULD ELABORATE A *NEW* CAUSE OF OBLIGATION

The unilateral promise scholars adverted to a need. They saw that private actors were making irrevocable promises that were taken not as offers but as promises. They also found that what seemed reasonable for the common person had no means of explanation for the lawyer. The lawyer could not think of promises as enforceable because she lacked the means to do it. Judges and parliaments wanted to enforce these promises. There was a "social need," as Worms likes to put it. The orthodoxy would presume acceptances, develop reliance doctrines and issue *obligationes ex lege*. The unilateral promise scholars found these attempted solutions insufficient or inadequate and thus reacted against the mainstream. They were progressive jurists. They thought it right to innovate in private law.

This is their main lesson—we can bring innovation to law. The problem, as I see it, is that they developed something other than a piece of private law. They wanted to develop a new cause of obligation but they developed something other than a cause of obligation. Instead of departing from that which makes the contract, tort and unjust enrichment

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[236] Gino Gorla, *Il contratto*, Vol I, Giuffrè, Milano, 1954, p. 193.

particulars of the "cause of obligation" genus, they departed from the perspective that favoured their task by arguing that promises obligate. The task for us is to remake the enterprise, but from a legal perspective. Given our private law, how and to what extent could we incorporate the social practice of promise?

3.3.2. THIS NEW CAUSE OF PRIVATE LAW LIABILITY MUST LIE NEXT TO THE CONTRACT WITHOUT OVERLAPPING IT; *IT MUST COMPLEMENT THE CONTRACT, NOT REPLACE IT*

Some unilateral promise scholars say that this new source of obligation has been constructed not to replace the contract but to complement it in its function of enforcing voluntary undertakings.[237] This is a correct view.[238] However, we must be cognisant that the way in which these scholars defined this new cause of obligations made their statement merely rhetorical.

As a matter of fact, if we establish a norm by saying: "A promise which is intended to be legally binding without acceptance is binding," the concept thereby underpinning, the concept of unilateral promise ends up debilitating the definition of contract qua agreed exchange of rights.[239] For if the enforceability of a unilateral promise requires no consideration from the side of the promisee, then why would consideration be a requisite for contract formation? But the unilateral promise dismantles the concept of contract in another way: It leaves room to construe the contract as a unilateral undertaking conditioned by the fact of acceptance. Contract therefore is no longer the bilateral act *par excellence*, where the offer of one party is separated only by the time of its manifestation from the acceptance of the other party. It then becomes difficult to explain just doctrines

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[237] MacBryde, Promises in Scots Law, *op. cit.*, p. 49 acknowledges the co-existence of promise and contract when he says "it is necessary to distinguish between a promise and an offer" and latter details the different legal implications of these two acts. *Idem*, 50. Though in *idem*, p. 51 MacBryde seems to see the structural consequences of making bare promises enforceable.

[238] Francesco Di Giovanni disagrees. To him "Ogni discorso intorno alle promesse unilaterali non può evitare di essere un discorso interno al contratto." *Le promesse unilaterali*, Cedam, Padova, 2010, at p. 3. "[S]e si costruisse la figura del contratto non già sull'idea dell'accordo, ma –per esempio—proprio facendo riferimento alla promessa o alle promesse recipoche in quanto generatrici di un vincolo, il consueto criterio distintivo tra contrato e promessa unilaterale ci verrebe a mancare." *Idem*, p. 4. The question Di Giovanni poses is whether we include one more category of cause of obligations or we reformulate the contract so as to include the interested promises. Di Giovanni choses the latter (*idem*, at p. 75-79 and ss.) It is also the position of Rodolfo Sacco, "Formation of Contracts," in Vv. Aa., *Towards a European Civil Code*, Kluwer Law International, The Hague, 2004, Chapter 19, pp. 353-362.

[239] The exposition of motives of the 1942 Italian Civil Code, which clearly adverted that: "It would not be possible to make the unilateral promise operate unlimitedly without disrupting the field of application of contract". *Relazione del Ministro Guardasigilli Grandi al Codice Civile del 1942, Libro IV Delle Obbligazione,* n. 783, at p. 177. In http://www.consiglionazionaleforense.it/site/home/pubblicazioni/collana-studi-storici-e-giuridici/articolo6388.html (27-1-2016)

like unconscionability, the exception from performance in case of the other's nonperformance (exceptio non adimpleti contractus), among others.[240]

There is another reason why the distinctiveness between contract and unilateral promise should be made crystal clear. This is that private lawyers of all jurisdictions are accustomed to thinking of contractual transactions in contractual terms. Almost all unilateral promise scholars are aware of this fact, and often acknowledge it with regret, as if it were the reason for the non-recognition of the unilateral promise. We must rather see the phenomenon as an indicator of how to introduce correct changes to the law prudentially. Contract law could actually relieve itself of a burden if the appropriate unilateral promise was placed next to it. Lawyers would have an easier means of thinking about "weird contracts," like the collateral contract seen in 2.2.

3.3.3. THE NEW CAUSE OF OBLIGATIONS MUST BE SET OUT TO GROUND THE PROMISES THAT TROUBLE PRIVATE LAW, OR ONLY THE *PROMISES EXHIBITING GIVING AND TAKING*

The unilateral promise scholars made a mistake by focusing on promises intended to be irrevocable. We simply cannot do that. For the emergence of an obligation it is insufficient that someone hurt herself, lose property or, as in our case, promise something. It is also necessary that another person gain something in relation to the other's loss, like enhanced freedom of action or enrichment, or give something in exchange. We must focus on promisors who intended to, and actually did gain something with their promises. Indeed, the promises that the most representative private laws seek to enforce exhibit the premises of the law of obligations. I am referring to the reward promises, the contract promises, the fake gratuitous promises and the cases seen in 1.1.3.4.

We must be very careful to avoid understanding gratuitous promises within the remit of the new category. Private laws cannot but be reluctant to enforce informal gratuitous promises. They simply cannot explain their obligation; they are irrational or juridically uncaused.[241] The task for us is to propose a conception of the unilateral promise that could cover the juridically relevant promises, while leaving aside the juridically irrelevant relationships. As Giorgianni graphically puts it, "we must individuate an area wherein the

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[240] See the insightful explanations elaborated in J. E. Penner, "Voluntary obligations and the scope of the law of contract," in *Legal Theory*, Issue 2, (1996), pp. 325-357, at 333-4. See also Peter Benson, "The Idea of Consideration," in *University of Toronto Law Journal*, 61, (2011), pp. 241-278.

[241] See the many persuasive reasons adduced by Mindy Chen-Wishart, "In defense of consideration," in *Oxford Commonwealth Law Journal*, Vol 13, No 1, (September 2013), pp. 209-238.

unilaterally undertaken performance escapes from the idea of mere gratuitous attribution."[242]

In fulfilling this task we would have adjusted the unilateral promise to the promises that trouble the private laws. Private law would have a better tool with which to address rare cases. It would no longer need to stretch the contract, blur the borderlines between freedom and liability, or produce insufficient *ex lege* obligations (See 2.5.). As a matter of fact, if a private law incorporated this new concept, all its corruptive arrangements would become futile, automatically abrogated. The natural consequence being this: The classical private law categories will readopt their healthy shape.

3.3.4. THE NEW CAUSE OF OBLIGATION MUST BE A GENERAL CATEGORY OF PRIVATE LAW LIABILITY, THIS IS TO SAY, IT MUST *PROVIDE FOR THE ENFORCEMENT OF* NOT ONLY TYPICAL INTERESTED PROMISES BUT ALSO *ATYPICAL INTERESTED PROMISES*

Jurists focused on promises in the late 19th century. At that time promises seemed rare. The only clear, identifiable feature was that they were products of someone's will. We now have better means of interpreting them. We discovered that promisors make these promises to obtain a chance. Through these cleverly made promises promisors induce promisees to consider doing things they want them to consider, from engaging in a contract to becoming consumers of their products. We called this phenomenon the creation of a chance (see 1.1.3.). These two concepts, promise-making and chance-creation, help us to elucidate interested promises as private law transactions. We can use these two concepts to elaborate the unilateral promise as a general cause of obligation. If a contract comprises an offer of an obligation and an acceptance with consideration, the new unilateral promise could comprise an act of promise and a chance-creation act.

The need to elaborate this concept systematically is not only technical but also juridical. Justice requires it because, even if the law could identify all the typical interested promises and establish special norms for their enforcement, nothing ensures the law would do justice to all cases, that no other interested promise will appear, demanding justice.[243] If a new promise happens to appear, and the law offers no provision for its enforcement, the legal stage is set so that a promisor makes a promise, gets the benefit of the chance and then decides to revoke the promise, doing injustice to the promisee

[242] Michele Giorgianni, voce "Causa (dir priv)," in *Enciclopedia del Diritto*, t. VI, Giuffrè, Varese, 1960, p. x.

[243] See the argument in 2.4.3.2.

(See 1.3.). So, to treat like cases alike, we must elaborate a general category for the enforcement of both the typical and atypical interested promises.

In conclusion, we have to take the generalization called interested promise and conceptualize it in a way that looks like a tort, contract, and unjust enrichment. The by-product of this juridical construction will be a just solution to the problem of promises. Only in this way will we construct the unilateral promise as a cause of obligation.

4. WE MUST TREAT THE INTERESTED PROMISE AS ANOTHER CAUSE OF OBLIGATION

This part is divided into three large sections. Section 1 asks what is a cause of obligation? Section 2, can we build new causes of obligation? And section 3, how do we build new private law? One could think of these three sections as three separate parts. Each one addresses relatively autonomous questions and equals in size the previous parts. I place them together in a single fourth part, because combined they make up the fourth step of my argument.

4.1. WHAT IS CAUSE OF OBLIGATION?

The study of the unilateral promise scholarship showed us the right attitude towards promises. We shouldn't be conservative. We could try to craft a solution that fits the new reality as exactly as possible. But we also learned from the mistakes of the progressive scholarship. We should not miss the shot. If we want to treat promises as a new legal institution we must treat them in the law's mode, not from a moral viewpoint.

The form that seems more apt for the interested promise is that of the contract, tort and unjust enrichment—namely a cause of obligations. But what do we mean by "cause of obligation?" More precisely, where do we find such a concept? And what does cause of obligation mean? These two questions will be answered under the first two headings. Heading 1 will say that the idea of a cause of obligation is found in private law. We see the concept of cause of obligation when we read laws that say things like "the obligations arise from the contract, the delict, the quasi-delict and the quasi-contract." Heading 2 defines the idea that renders the various causes of the obligation classifiable. We will find two possible meanings for such a general idea. Legal formalism, with its thesis that cause of obligation means justice in transactions, will defeat the thesis of legal positivism.

But the work of this section is not yet complete. We need to describe the concept of a cause of obligation; what are its constitutive features? If we want to formulate the interested promise as a concept that looks like the contract, tort and unjust enrichment, we need to have an idea of what the thing representing those various concepts itself looks like; we need the mould that the interested promise must adopt. Title 3 finishes this section by outlining the conditions under which obligations can arise.

4.1.1. A CONCEPT (OF CAUSE OF OBLIGATION) LIVES IN THE CLASSIFICATIONS OF THE OBLIGATIONS

Here I will show laws of different epochs that classify obligations in accordance with their causes. This is an important point. Firstly because it shows that the bases of private law liability vary in number and form as private law approaches diverse "times" or realities. And secondly, and equally importantly, we will see that the (so-called "grand") idea that the various causes of the obligation are different types of one genus lives within the very private law itself. It is not theoretical caprice. Private law demands of the theorist a unitary explanation of the basis of private law liability.

4.1.1.1.1. DICTUMS CLASSIFYING THE OBLIGATIONS IN ACCORDANCE WITH THEIR CAUSES

(A) GAIUS

The first example of such classification appears in a book written in the first century after Christ by the classical Roman jurist Gaius.[244] Part 1 of The Institutes[245] is about "persons" and Part 2 about "things." Part 3 is about the "actions" or claims that one person may make of another concerning things. Some such claims are obligations, the legal necessity that a person give or do something to another.

In Part 3 Gaius says: "Let us now proceed to the obligations. These are divided into two main species: for every obligation arises either from contract or from delict." [246] Gaius is saying here that we must expose the law of obligations from the facts that, according to the law, obligate one party to another. In this Gaius innovated. Obligations were classified not in accordance with the facts that placed them, but in accordance with their possible contents; whether the obligation required the giving of a thing or service. And Gaius'

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[244] Conf. Mario Talamanca, "Obbligazioni, (dir. rom.)," in *Enciclopedia del Diritto,* t. XXIX, Giuffrè, Varese, 1979, p. 41. Also Savigny, according to whom, all Roman text known to his time followed Gaius. *Le obbligazioni*, Giovanni Pacchionni translation, t. II, UTET, Torino, 1912, §51, p. 3.

One cannot but notice the resemblance between Gaius' division of the obligations and Aristotle's division of corrective justice:

> This second species has two parts, since one sort of transaction is voluntary, and one involuntary. Voluntary transactions (for instance, selling, buying, lending, pledging, renting, depositing, hiring out) are so called because their principle is voluntary. Among involuntary transactions some are secret (for instance, theft, adultery, poisoning, pimping, slave-deception, murder by treachery, false witness), whereas others involve force (for instance, imprisonment, murder, plunder, mutilation, slander, insult).

Aristotle, Nicomachean Ethics, Terence Irwin translation, 2 ed, Hackett, Indianapolis, 1999, Book V, Chapter 2, §13, at 1131a.

[245] I utilize Francis De Zulueta, *The Institutes of Gaius, Part I, Text with critical notes and translation*, Clarendon Press, Oxford, 1946 (Hereinafter: Gaius, *Institutes*.)

[246] "Nunc transeamus ad obligationes. quarum summa divisio in duas species deducitur: omnis enim obligatio vel ex contractu nascitur vel ex delicto." Gaius, *Institutes*, III, 88.

innovation had a notable impact. Many law books will present the law of obligations with this same method. The question will be "On what facts would it be true of a defendant that he owed the plaintiff such and such a fixed thing or quantity?" [247]

(B) JUSTINIAN'S INSTITUTES

Another version of the classification appears in the Institutes of the emperor Justinian, which "deduces the obligations into four species: obligations arise from contract, or as though from contract, or from a delict, or as though from a delict."[248]

Three centuries separate Gaius and Justinian's Institutes, and it seems to be that in this period new causes of obligation appeared in Roman private law. [249] These causes seemed anomalous in relation to the contracts and the torts. Yet the writers of the new Institutes found that in some sense some of them looked like the contracts and that in some other sense the others looked like the torts. Hence, after dealing with the contracts, Justinian's Institutes deals with the quasi-contracts,[250] including the *negotiorum gestio*, by which the beneficiary of an unrequested agency was obligated to pay for the benefit received,[251] the *indebitum solutum*, by which the receiver of a mistaken payment was obligated to restitute the sum, [252] the *tutela*, where the guardian can sue the ward for outlay incurred in

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[247] Peter Birks, "Definition and Division: A Meditation on Institutes 3.13," in Birks, Peter (ed.), *The Classification of the Obligations*, Oxford University Press, New York, 1997, p. 17.

[248] "Sequens divisio in quattuor species diducitur: aut enim ex contractu sunt aut quasi ex contractu aut ex maleficio aut quasi ex maleficio." Justinian, *Institutes*, 3, 13, 2. I utilize J.B. Moyle translation available in http://www.gutenberg.org/files/5983/5983-h/5983-h.htm (6-7-2015) and the translation available in http://faculty.cua.edu/pennington/Law508/Roman%20Law/JustinianInstitutes.htm (6-7-2015) (Hereinafter: Justinian, Institutes.)

[249] To many authors the four-membered classification is a continuation of a tripartite classification, which appears in the Digest of Justinian 44, 7, 1pr, as belonging to the same Gaius of the bipartite classification. It says: "Obligations arise from a contract, a delict, or in a particular mode from other various causes of the obligation". I utilize http://www.thelatinlibrary.com/justinian.html (6-7-2015) and the translation available in http://droitromain.upmf-grenoble.fr/Anglica/D44_Scott.htm#VII (27-1-2016) (Hereinafter: Justinian, Digest.)

Emilio Betti argues that, if Gaius created a miscellaneous receptacle to group all the emerging figures that were anomalous to the contacts or to the torts, the Byzantines created the obligations quasi ex contract and obligations quasi ex delict by assimilating some of the various figures to one of the two classical categories and the rest to the other classical category. *Teoría general de las obligaciones*, t. II, José Luis de los Mozos translation, Revista de Derecho Privado, Madrid, 1970, §II, ns. 3-6, (with very interesting remarks on the constructive methods of the Roman jurists).

[250] Justinian, *Institutes*, 3, 27.

[251] Justinian, *Institutes*, 3, 27, 1.

[252] Justinian, *Institutes*, 3, 27, 6-7. Interestingly: "an obligation, indeed, which is so far from being contractual, that, logically, it may be said to arise from the extinction rather than from the formation of a contract; for when a man pays over money, intending thereby to discharge a debt, his purpose is clearly to loose a bond by which he is already bound, not to bind himself by a fresh one. Still, the person to whom

managing his property,[253] and other cases.[254] Likewise, after dealing with the torts, the Institutes deals with the obligations that look like torts without actually being torts,[255] including *effusum et delectum*, by which someone is liable to compensate the harm caused by things thrown down or fallen from one's terrace,[256] the *damnum injuria vel furtum in navi canpona stabulo factum*, where ship-owners, inn and stable keepers are liable for willful damage or theft committed in their ships, inns, or stables by some or one of their servants or employees,[257] and other cases.[258]

(c) Theophilus' translation

The Institutes of Justinian were published in Latin, but Theophilus, one of its three writers, only translated them into Greek. He wanted a version for his students at the university of Beirut. In this translation the terms "as though from a contract" and "as though from a tort" appear in the form "as from a though-contract" and "as from a thought-tort." The Byzantines felt impelled to fully substantivize the new concepts. [259]

This turn had a notable impact on the development of later classifications. The book that the first European jurists studied in twelfth century Bologna was a Latin translation of Theophilus' Greek version of the Institutes. This is why Accursius's *Magna Glosa* and

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money is thus paid is laid under an obligation exactly as if he had taken a loan for consumption, and therefore he is liable to a condiction." Justinian, *Institutes*, 3, 27, 6.

253 Justinian, *Institutes*, 3, 27, 2.

254 Firstly, the communio: "where persons own property jointly without being partners, by having, for instance, a joint bequest or gift made to them, and one of them is liable to be sued by the other in a partition suit because he alone has taken its fruits, or because the plaintiff has laid out money on it in necessary expenses" Justinian, Institutes, 3, 27, 3-4. And secondly, the legatum per damnationem: "So, too, the obligation of an heir to discharge legacies cannot properly be called contractual, for it cannot be said that the legatee has contracted at all with either the heir or the testator: yet, as the heir is not bound by a delict, his obligation would seem to be quasi-contractual" Justinian, Institutes, 3, 27, 5.

255 Justinian, *Institutes*, 4, 5.

256 "…[T]he reason why his liability cannot properly be called delictual being that it is usually incurred through the fault of some other person, such as a slave or a freedman." Justinian, *Institutes*, 4, 5, 1.

257 Interestingly: "the action which is given in such cases is not based on contract, and yet as they are in some sense in fault for employing careless or dishonest servants, their liability would seem to be quasi-delictal." Justinian, *Institutes*, 4, 5, 3.

258 The other two cases are the *iudex qui litem suam facerit* or obligation incurred by a judge who delivers an unjust or partial decision, (Justinian, Institutes, 4, 5, fr.) and the *positum et suspendum*, where a son in power places or hangs something from a balcony in a way that is dangerous to the public (Justinian, *Institutes*, 4, 5, 2., a rather public law obligation…).

259 Theoph. II, 27, 3, 5; IV, 5 fr, quoted by Emilio Betti, *Teoría general de las obligaciones…*, *op. cit.* §II, n. 6 *in fine*, p. 41.

Bartolo's commentaries classify the obligations into four well rounded categories: contract, quasi-contract, delict and quasi-delict.[260]

(D) R. J. POTHIER, THE CODE CIVIL AND THE FIRST CODICE CIVILE

To modern eyes many cases historically included in the categories of quasi-torts and quasi-contracts were at odds with the ideas of tort and contract that had recently been consolidated. If the torts were about willfully or negligently committed wrongs, it seemed difficult to say that the damage caused by things spontaneously falling from terraces was an almost-tort. On the other hand, if contract was about the agreement of two parties, how could a tutor be responsible for the acts of the ward under an almost-contract if, as in the case of many quasi-contracts, not even the tutor had consented the charge? Robert J. Pothier solved these issues in a new, five-membered classification.[261]

First comes the contract, which meant agreement made with the aim of forming an obligation.[262] The second cause of obligation is the quasi-contract, which has to do with acts of persons that are permitted by the law but nonetheless obligate the actor as to the other or the other as to the actor, without having made an agreement.[263] Then comes delict, which means a fact by which one person, by *dolus* or malice, causes damage or any other tort to another.[264] The quasi-delicts are the acts by which a person, without malice but due to an imprudence that cannot be excusable, causes some damage to another. [265]

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[260] The influence of Justinian's four-membered division has been qualified as "little praiseworthy." It induced the glossators and commentators to elaborate a concept of quasi-contract that could be relatable to the concept of contract, while the historical cases of the concept of quasi-contract could be related to the contract cases only improperly and falsely. "E purtroppo si è dovuto compiere un lungo e penoso lavoro dottrinale e giurisprudenziale, per correggere le dottrine suddette." Nicola Stolfi, Diritto Civile, v. III, *Le Obbligazioni in Generale*, UTET, Torino, 1932, n. 230, p. 113.

[261] Robert J. Pothier, *Traité des Obligations*, Paris, 1764, n. 2. (Available in Google Books)

[262] *Idem*, n. 3.

[263] *Idem*, n. 113. He mentions three cases. First, the acceptance that an heir makes in relation to succession is a quasi-contract vis-à-vis the legatee; this is a fact permitted by the law, which nevertheless obligates the heir as against the legatee to pay the legate established by the deceased testator, even if there was no agreement between heir and legatee. Second, when one pays by error of fact a thing that one does not have to pay, the payment of such thing is a fact that obligates one who has received the payment; this is true even if we could not say the mistaken payer and the receiver agreed that the receiver will return the payment . Pothier adds the *negotiorum gestio* without making any significant point (though if I got it right, he says that the *dominus negotii* must pay to the gestor "all that which he has disbursed") and finishes saying that there are other examples of quasi-contracts. *Idem*, n. 113. As to the explanation, Pothier says "[I]t is the sole law or the natural equity which produces the obligation, in making obligatory the fact from which it results. This is why these facts are called *quasi-contracts*; because without being contracts, nor even delicts, they produce the obligations as the contracts." *Idem*, n. 114.

[264] *Idem*, n. 116.

[265] *Idem*, n. 116.

The fifth category includes the obligations that arise by "the sole authority of the law."[266] This category includes events by which a party becomes obligated to do something without an act on his part, like the *tutela* (a former quasi-contract) and the *effussum et delectum* (a former quasi-tort).[267]

We find the five-membered classification in Art. 1370 of the French Civil Code[268] and in many of the Civil Codes influenced by the latter. For example, Art. 1097 of the 1865 Italian Civil Code says: "On the causes of the obligations: The obligations derive from the statutory law, from contract or quasi-contract, from delict or quasi-delict." [269] The innovation in relation to Art. 1370 French Civil Code is that the causes of obligation appear clearly enumerated, no example is admixed into the categories and, as is often noted, the *ex lege* obligations appear first in the list.[270]

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[266] *Idem*, n. 123.

[267] To be frank, the *effussum et delectum* is not enumerated in n. 123. But neither is it included as a quasi-delict in nn. 116-122. The *damnum injuria vel furtum in navi canpona stabulo factum* is included among the quasi-delicts, under the interesting argument that, "it has been established so that patrons have more care in serving themselves of good servants." (n. 121.) Still, in n. 123 *in fine* Pothier says that "On peut rapporter beaucoup d'autres exemples d'obligations qui ont pour seule & unique cause la loi." I gave the example of the *effussum et delectum* to illustrate my point.

[268] After dealing with the obligations that arise out of contract (Book III, Title I and subs.), the *Code* introduces the chapters "On quasi-contracts" and "On delicts and quasi-delicts" with the polemic Article 1370:

> Certain engagements are formed without any agreement intervening, neither on the part of him who obligates himself nor on the part of the one toward whom he is obligated. Some result from the sole authority of the law; others arise form an act personal to him who finds himself obligated.
>
> The first are engagements made involuntarily, such as those between neighboring owners, or those of guardians and of other administrators who may not refuse the function which is conferred upon them.
>
> Engagements which arise from an act personal to him who finds himself obligated result either form quasi-contracts or from delicts or quasi-delicts; they constitute the subject-matter of the present Title."

I utilize: *The French Civil Code (as amended to July 1, 1976)*, John H. Crabb translation, Fred. B. Rothman & Co, New Jersey, 1977.

[269] Likewise, Article 1.089 of the 1871 Spanish Civil Code says: "Las obligaciones nacen de la ley, de los contratos y cuasi contratos, y de los actos y omisiones ilícitos o en que intervenga cualquier género de culpa o negligencia."

[270] This is something that Italian and Spanish jurists generally remark upon. For the Italians, see Michele Giorgianni, "Appunti sulle fonti dell'obbligazione," in *Rivista di Diritto Civile*, I, (1965), pp. 70-75, at p. 71; for a Spanish perspective, see Augustín Ignacio Pena Lopez, "Criterios de sistematizacion de las fuentes de las obligaciones," in *Actualidad Civil*, No 4, (1993), pp. 717-735, at p. 725.

One of Betti's central claims in his account of the evolution of the classification of the obligations is that the Romans, in contrast with modern jurists, would never impute an obligation to a party without an act on his part that could cause it; an act that required the actor's awareness of the fact that such act causes obligations.

> Nada repugna tanto a la conciencia juridica de los romanos como admitir que un vincula doloroso y fuera de lo corriente, que somete una persona bajo el poder de otra—que es como concebian la obligatio—pudiese producirse por si mismo, ope legis, sin el conocimiento y la voluntad de la persona misma que ha de ser vinculada. Nada mas contrario al espiritu romano que pensar que la ley pueda originar un vincula semejante

(E) THE CLASSIFICATION IN THE GERMAN CIVIL CODE

In German private law the classification appears not in a special provision but in the method of organization (or table of contents) of its Civil Code (BGB). The BGB[271] is mainly divided into Books. The "Second Book" is titled "The law of obligations", and is divided into sections. The first six sections deal with the possible content of obligations, the performance or regular mode of extinction of obligations, the impossibility to perform, the irregular modes of extinction of obligations, assignment of claim-rights, assumption of debt, and plurality of debtors and creditors. Having established what is common to almost all the obligations, the Second Book moves to deal with the various causes of obligations. Indeed, the last Section of the Second Book is called "Particular Obligations," and is divided into 25 Titles, which set the causes of the obligation alongside each other: First the typical contracts (e.g. Title 1 deals with the sales contract, Title 6 with the contract of service, and so on), then the unilateral promises (Title 20), then the "unjust enrichment" (Title 24) and finally the "delict" (Title 25).

We see that the BGB classifies the obligations in a traditional and explicit manner. The classification follows the tradition of classifying the obligations in accordance with their causes because it gives different treatment to obligations according to the different events that cause them to arise. The BGB could have adopted a different approach, like dividing the obligations according to their possible content—whether they relate to a fixed thing, a quantity, or a service—or their purposes—whether they assure expectations, compensates losses, prevent or punish deeds, etc. What is more, the BGB states the classification explicitly. The indicia of the classification are the very wordings of the BGB. The BGB first deals with the general concept of "obligation" (first seven sections), then treats the "particular obligations" (Section 7) in different title-groups, each title group separated by titles that talk about "Contract" (Title 1), "Unjust enrichment" (Title 24) and "Delict" (Title 25). That the BGB explicitly classifies the obligations in accordance with its causes is confirmed by the fact that, according to Dernburg and von Tuhr, "the legends of

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sin tener en cuenta la conducta del sujeto individual, que piuedadar lugar a una obligacion en virtud de un hecho o de una situacion, prescinidiendo de un acto de parte.

Emilio Betti, Teoría general de las obligaciones…, op. cit., §II, n. 8, at 47-48.

[271] I use *The German Civil Code (as amended to January 1, 1992)*, Simon L. Goren translation, Rothman, Colorado, 1994.

the sections, titles, etc., facilitate the Code's employment but, at the same time, are part of the law, and therefore, they must be taken into account for the interpretation."[272]

(F) THE CLASSIFICATION IN MODERN COMMON LAW

It was not only the codified private laws that classified obligations in accordance with their causes, the modern common law did too.[273]

> In the Preface to the first edition of The Law of Tort Pollock revealed himself as consciously engaged in the exercise of writing an English law of obligations. The book was dedicated to Willes J, and Pollock recalled that that most learned of judges had always urged the writing of an English law of obligations. Pollock then observed that the completion of a book on the law of tort, added to a book on the law of contract, did not of course constitute a whole law of obligations. Winfield ventured further into the missing sector, but it was not until Goff and Jones [wrote The Law of Restitution] that real headway was made into the area which Pollock said remained to be explored beyond contract and tort.[274]

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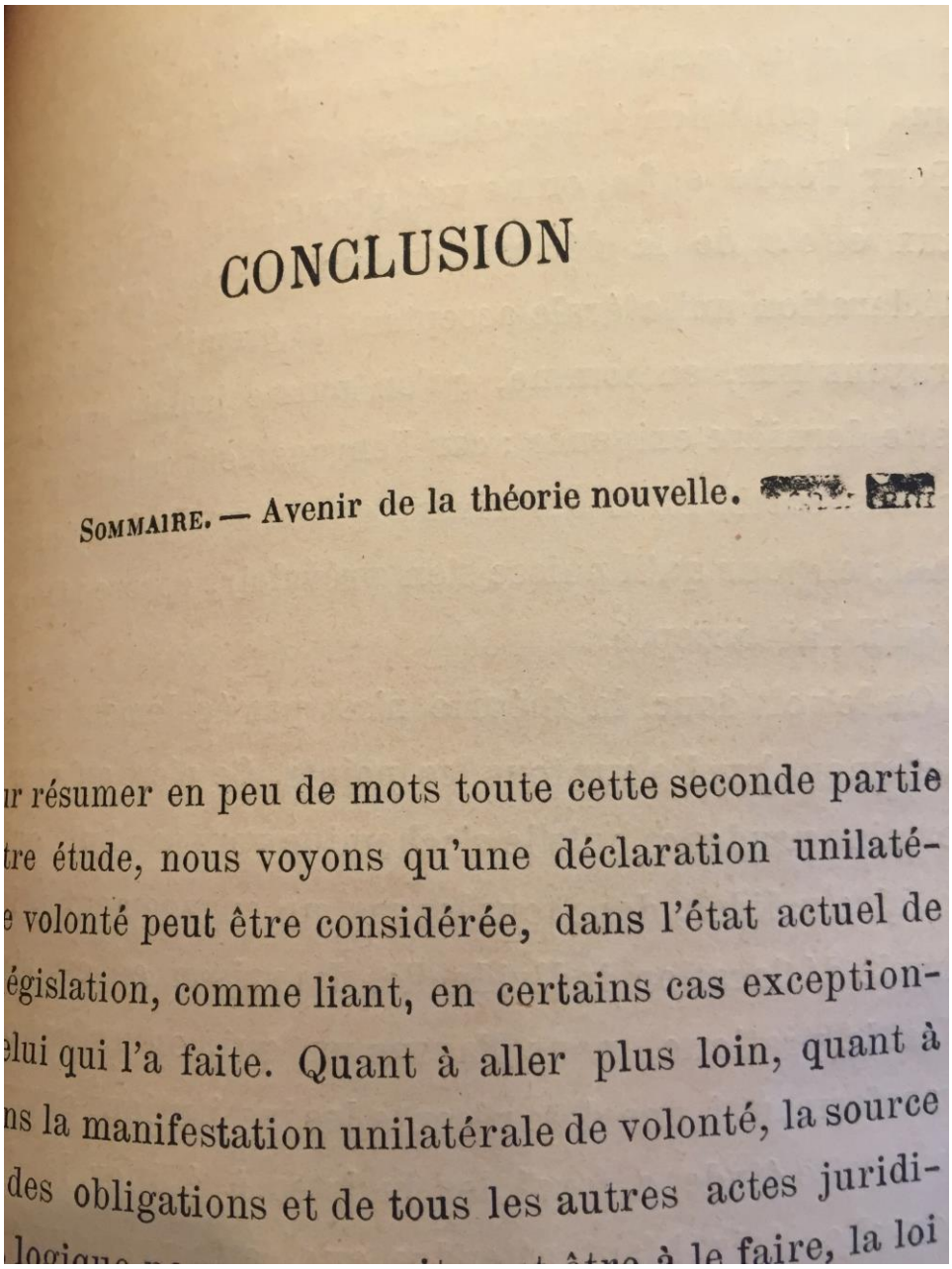
[272] Andreas von Tuhr, *Derecho Civil, Vol. 1: Teoría General del Drecho Civil Alemán*, Tito Ravá translation, Marcial Pons, Madrid, 1998, p. 12, following Arrigo Dernburg, *Diritto delle obbligazioni*, 6°, Francesco Bernardino Cicala translation (?), Bocca, Torino, 1903, §7.

Let me add this argument: The BGB does not mention concepts of obligation and contract. Yet, no one would argue that the BGB works without a clear-cut idea of obligation and contract. Analogically, even if the BGB includes no classificatory provision, the BGB does classify the obligations in accordance with their causes.

[273] "Unlike the civil law, the common law was not shaped by the work of jurists for a long time. Traditionally, those learned in law were either judges or practitioners. There was little legal literature beyond the reports of decided cases. A few treatises had been written, such as Coke's *Institutes*, but they were unsystematic in the extreme. The Common lawyers did not try to be systematic. Their law was organized, not by categories such as tort or contract, but by writs, such as assault and battery or assumpsit. A constellation of past cases determined when each writ could be brought. There was not much order in the case law. […] Beginning with Blackstone, matters changed. Treatise writers reorganized the common law into doctrinal categories and formulated rules to explain the cases, borrowing a good deal from civil law. Their method was like that of the Roman jurists and their continental successors. They worked in symbiotic relationship with the law as declared by state authority, which, for them, was case law. They tried to explain this law in a more systematic way by rules and doctrines which the judges who had decided these cases did not distinctly have in mind. Judges then drew upon their work to decide new cases, thus providing them with further starting points. Their work shaped the modern common law."

James Gordley, "The State's Private Law and Legal Academia," in Jansen, Nils and Ralf Michaels (eds.), *Beyond the State: Rethinking Private Law*, Mohr Siebeck, Tubingen, 2008, pp. 640-1 (arguing that both the common and civil law traditions are about jurists working in symbiotic relation with public authorities).

[274] Peter Birks, "Definition and Division…," *op. cit.*, pp. 3-4 (citations omitted).



CONCLUSION

SOMMAIRE. — Avenir de la théorie nouvelle. [redacted]

ır résumer en peu de mots toute cette seconde partie
tre étude, nous voyons qu'une déclaration unilaté-
e volonté peut être considérée, dans l'état actuel de
égislation, comme liant, en certains cas exception-
elui qui l'a faite. Quant à aller plus loin, quant à
ns la manifestation unilatérale de volonté, la source
des obligations et de tous les autres actes juridi-
logique [redacted] être à le faire, la loi

Worms inaugurates a tradition of writing thesis about promises in France; the most noteworthy are: R. Elias, Théorie de la force obligatoire de la volonté unilatérale, Paris, 1909 ; A. Goldberg, Essai d'une théorie générale de l'engagement juridique par volonté unilatérale d'après le Code civil allemand, Paris, Larose et Thorin, 1913 ; J. Chabas, De la déclaration de volonté en droit civil français, Paris, Sirey, 1931 ; P. Carous, La volonté unilatérale-Source d'obligations en droit privé moderne, Lille, Douriez-Bataille, 1938. More recently M.L., Mathieu-Izorche, L'avènement de l'engagement unilatéral en droit privé contemporain, Aix-en-Provence, Puam, 1995.

(Picture taken from the original, Worms, René, De la volonté unilatérale considérée comme source d'obligations en droit romain et en droit français, (thèse pour le doctorat présentée et soutenue le mardi 23 juin 1891, Université de France, Faculté de droit de Paris, by René Worms), A. Giard, Paris, 1891, p. 197) (Thx Pernille!)

These three books, Professor Birks points out, provide the common lawyer with an almost complete law of obligations. Birks does not mean that the classificatory debate should be closed. On the contrary, the common lawyer must "reconnect" with the tradition endorsed

by the classical common lawyers. Indeed, in his book *The classification of the obligations*, Birks invites common law jurists to try out classifications or share their views on the classificatory enterprise. Birks's contribution is addressed to the common lawyer who is interested in finding similarities between the common and continental private law. Ernest Weinrib not only classifies the obligations in accordance with their causes, but also argues that such classification is internal to the common law. Understanding the criterion with which the obligations are classified is having the standpoint from which to criticize arrangements on private law liability.[275]

The scholarly idea of a common law of obligations achieved institutional significance in 1995. The Law Society and the Council of Legal Education talk about "Obligations I" and "Obligations II" in their statement on the subjects that are compulsory for aspiring lawyers. [276] The word "Obligation" was absent in the previous statement. As Birks remarks, the terminology was chosen to remind English lawyers that they do have a law of obligations. Without such terminology, "there would be few young common lawyers able so much as to contemplate contract and tort as coordinated parts of one law of obligations."[277]

4.1.1.2. A CONCEPT OF "CAUSE OF OBLIGATION" IS IMPLICIT IN THESE CLASSIFICATIONS

What Gaius, Theophilus, Pothier and the writers of the Italian Civil Code actually intended with their classifications is a question I cannot answer. I am far less ready to conclude that the writers of the BGB or the developers of the modern common law sought to classify the obligations in the way that more or less explicitly appear classified in their texts. What I am ready to point out is what any serious reader of those classifications would infer. This inference is that the items listed in the classification are particulars of a general concept, cause of obligation. Whether you classify the obligations in tort and contract, or in tort, contract and unjust enrichment, or in statutory law, contract, tort, quasi-contract and quasi-tort, whatever item you put along with another as members of a classification, of a

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[275] Ernest Weinrib, "The Juridical Classification of The Obligations," Birks, Peter (ed.), *The Classification of the Obligations*, Oxford, New York, 1997, pp. 37-55.

[276] The Law Society and the Council of Legal Education, Notice to Law Schools regarding Full-Time Qualifying Law Degrees (Jan., 1995). Quoted in Peter Birks, "Definition and Division…," *op. cit.*, p. 2, note 2.

[277] Peter Birks, *Idem*, p. 2.

single family, you must by necessitation, relate them as particulars of a genus, of a single sort of thing. The contract is a cause of obligations inasmuch as the tort, albeit dealing with different interactions to tort. But for contract and tort to be causes of obligations, they must be identical in something—something that makes them kinds of the same genus.[278] This thing that contract and tort share as causes of obligation is the abstraction that I call "cause of obligation."[279]

4.1.1.3. IF ANYTHING, THIS CONCEPT DEMANDS COHERENCE AMONG THE CAUSES OF THE OBLIGATION

You submit yourself to an intelligence test. There you see a diagram containing various items. The first item you see is a dog. The dog makes you think of your childhood, pet-shops, your parents and first neighborhood. But then you see a crocodile—you hence discard all your previous memories. Your biography has nothing to do with crocodiles. Still, aligned, as they are, in a suggestive way, dog and crocodile demand some sort of generality, a coherent explanation. You may think that the dog is a mammal and the crocodile a reptile and that both dog and crocodile form part of the animal kingdom. Or you may relate them as parts of the collection of your city's museum. You may say one thing or the other, depending on the perspective from which you see them, a perspective that can be self-constructed, as arbitrarily imposed by you the observer, or inferred from the very text, as if you wanted to approve the intelligence test. The task becomes easier if the list includes a third kind of animal, or a picture of a museum's façade. [280]

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[278] "It is obvious that the logical form must be absolutely equal to all the objects of the species which it determines. Its objectivity lies in this "ratio indifferentiae" (to quote the Sotics), so that it may comprehend equally the various contents of different examplars and represent them only in what is identical and essentially common." Giorgio Del Vecchio, *The Formal Basis of Law*, John Lisle translation, MacMillan, New York, 1921, p. 80.

[279] The phraseology appears in legal monuments like the Digest of Justinian (Dig. 44,7,1pr.) and 1865 Italian Civil Code (Art. 1097). Its natural competitor is "source of obligation," which appears in Robert J. Pothier, *Traité des Obligations*, *op. cit…*, n. 2, and the French scholarship in general. The pro of using "source of obligation" is that it imports to our concept the color that the phraseology "source of the law" obtains from the concept that itself connotes. Conf. Pietro Rescigno, "Obbligazioni (nozioni)," in *Enciclopedia del Diritto*, t. XXIX, Giuffrè, Varese, 1979, p. 149. I however choose to use the expression "cause of obligation" because it is less metaphorical. Even if metaphors could serve us in talking about law, the space or artifact to which "source" refers, its standard physiognomy and the activity to which it is related, is not useful to convey the image that I want to develop in the text. See 4.1.3.4.1-2.

[280] These small changes in context open two wholly different doors. One invites you to think of amphibians, fish… you may end up thinking of humans as part of the animal kingdom. The other pushes you somewhere else. You think of wood and marvel, a nineteenth century building, Charles Darwin, the world of science. You may end up thinking of humans as scientist, authors of nature.

The point I am trying to make is that items in a classification demand a common explanation and, in its turn, the chosen explanation determines the intelligibility of the items classified. The same must obtain in law.

In today's most widely accepted conceptions of law, law is not a natural order—an order for which someone who acts unlawfully is someone who deviates from the natural way of being.[281] On the contrary, we believe that law is a group of rules that humans developed in tandem with other aspects of their culture. Law is a judgment about what must follow certain circumstances, given a desired goal, idea of reason, tradition or procedure. So, in law, a law is a law because an intelligence or will elaborated it in accordance with a self-constructed idea of what law should look like. This ought to be the law because this law promotes X desired goal, manifests this or that principle of practical reason, resembles our father's law, or was validly enacted. Given the purposive nature of law then, what sort of generality are we to give our legal classifications?

Cause of obligation is not external to the causes of obligation as the concept of animal is external to the things that you could class under the sub-concepts of mammal or reptile. The will that said; "from this circumstance must follow an obligation," and added "this link of circumstance and obligation is to be considered another cause of obligation" is a will which, if it took the classificatory enterprise seriously, ordered the obligation in accordance with the genus "cause of obligation." From the moment of the enactment on, the only possible interpretation for this link of circumstance and obligation is one of a cause of obligation, whatever that means. The genus (cause of obligation) is in this sense internal to the particular (causes of the obligation). A cause of obligation, unlike a dog, is

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[281] An example of this way of thinking appears in Cicero, *De re publica*:

> *True law is right reason in agreement with nature*; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts form wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed form its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. *Whoever is disobedient is fleeing from himself and denying human nature*, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.

C. Walker Keyes translation, Putnam, New York, 1928, III, xxii, 33 (Italics are mine). Also eloquent is Ulpian:

> Natural law is that which all animals have been taught by Nature; this law is not peculiar to the human species, it is common to all animals which are produced on land or sea, and to fowls of the air as well. From it comes the union of man and woman called by us matrimony, and therewith the procreation and rearing of children; we find in fact that animals in general, the very wild beasts, are marked by acquaintance with this law.

Quoted in Justinian, *Digest*, I, 3.

a creature defined by the agent who classified it that way. In this sense jurists play God. For the jurist to say this thing is a cause of obligation it is akin to God saying this thing is an animal and shall be interpreted thus.

4.1.2. Cause of obligation as justice in transactions

4.1.2.1. Two "matters" for coherence: Legal positivism vs. Legal formalism

What is the thing that makes contract and tort causes of obligation? Or, what is the character that makes the items classified as causes of obligation causes of obligation? What is there in tort that makes it look like a contract and in contract that makes it look like a tort? The answer to these questions depends on the definition one puts to work in pursuit of the coherence demanded by the abstract concept of cause of obligation.[282]

4.1.2.2. Legalism explains too much, and too little

There are two main answers to the question. The standard answer says that one cause of obligation looks like the others in that all are about a situational case to which the law has attached a legal effect. All causes of obligation are kinds of the same genus because all are final products of a certain procedure by which human behavior became the antecedent of an enforceable demand. So, if all causes of obligation establish, on the one hand, a type of situational case (like "agreement with patrimonial content," "wrongly caused harm" and "enrichment without cause"), and on the other hand, a type of constraint (like "act in accordance with the agreement," "compensate for the inflicted damage" and "restitute the enrichment"), it is because the situational facts and constraints have been linked as causes and effects by a legislature, court or some other authorized will.[283]

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[282] In some sense we are all formalists. "L'attività giuridica, nonché opporsi e resistere al formalismo, s'identifica appieno con esso, e senza di esso non potrebbe neppure concepirsi. Il formalismo non le è estraneo ed arbitrario, ma essenziale e costitutivo: è attività giuridica soltanto nel grado della sua formalità." Natalino Irti, *La cultura del diritto civile*, UTET, Torino, 1990, p. 122, arguing that even the realists are somehow formalists. The question for all of us is "What is the form of our chosen form?"

[283] Almost all jurists writing in the period of 1850-1970 follow the same pattern of thought. Few show their pattern of thought as clearly as Pena Lopez:

> The obligations, insofar as they are legal effects, need for their birth of the same presuppositions (of born): a fact that is recognized by a norm as the origin of its birth… Hence there is no obligation without a norm that attributes to a fact the significance of producing them… From this point of view we can say that the norm is source of obligations: in the sense that efficient cause of the obligatory relationship is inexcusably the norm… All juridical relationship, and so the obligatory relationship, born from the mandate in which a juridical norm consists, and the holder of all mandate or of all juridical norm is the juridical order… But the norm, as we have been saying, does not produce the obligatory relationship but as a consequence of certain facts that the very norm is contemplating as productive of obligations. So that the fact assumes, in between the norm and the obligatory relation, the role of mediator for the production of the former, in that it is the determinant condition of the causality of the norm in the production of the relation.

In the legalist conception then, cause of obligation is the validly enacted will by which a certain situational case is the necessary antecedent of an enforceable demand. This is a powerful way of explaining the similarities among the various causes of obligation in organized societies. However, this theory fails both through excess and through insufficiency.

Legalism explains too much because, by means of its explanation, one can end up mixing contracts, torts and unjust enrichments with things that, from a practical perspective, have nothing to do with contracts, torts and unjust enrichments. To wit, if the common pattern is that an authority had validly linked a fact to a duty, then a contract is as much a cause of obligation as is a tax base. The hyper-inclusivity of legalism renders the classificatory enterprise senseless (compare 4.2.2.1 with 4.2.3.1). On the other hand, legalism has a shortage of explanatory power. Legalism explains too little because it fails to explain the case of obligations outside state-like organized societies. Is Argentina obligated to pay a loan received from a private actor? The creditor will say, "Yes," on the basis of the argument: "We made a loan contract." But Argentina could say "So what?" Now the creditor must justify. The legalist justification must look like an answer to this question: "What is the validly enacted norm according to which a contract signed by a state and a private actor is the antecedent of an enforceable obligation?" The legalist finds herself in difficulty. She cannot point to her state's private law (for Argentina is sovereign in relation to other states or, to prevent an argument, the contract was signed in *mare liberum* and no judicial authority is therein referred) nor she can point to Kelsen's international law (for the case's creditor is not a state like Argentina).

4.1.2.3. CHOOSING JUSTICE AS COHERENCE

There is another theory for the likeness or coherence that the causes of obligation must exhibit.[284] This theory maintains that the causes of obligation are similar because they are all about justice in transactions (between persons and concerning things).

This theory shares with legalism the view that law is an act of will. Legal consequences do not follow naturally from phenomena. A judgment linking a fact to another could be legal even if, as a matter of fact, the factual consequence never followed from the factual antecedent. But these two theories differ in many respects. To start with, to the jurist, the

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Augustín Ignacio Pena Lopez, "Criterios de sistematizacion de las fuentes de las obligaciones," in *Actualidad Civil*, No 4, (1993), pp. 717-735, at p. 717.

[284] I am inspired mainly by Peter Benson, Ernest Weinrib, Fernando López de Zavalía, Werner Goldschmidt, Giorgio Del Vecchio, Gustav Radbruch and Rudolf Stammler. See works cited in bibliography.

will that links a fact to an obligation is not an arbitrary will—something a Hobbesian legalist could accept. The will that links a fact to an obligation uses a specific kind of reason, a reason that precedes her, him or it. And this kind of reason is thicker than the kind of reason that other (less realist) legalists would find necessary to link obligations to facts. If for democratic legalists this reason is a process, for the jurist it is a principle; namely, the rule of equal freedom or, as it manifests itself in the law of obligations, equality in transactions.[285]

An implication of such principle-based law is that anyone can say that an obligation must follow from a fact. To be a lawgiver you need to learn private law, know how to argue in terms of justice. It is inessential that others legitimate you with a power to make law. Another difference is that in the legalist's view the link between obligation and fact is external to the obligation and the fact. If the authority did not say that from X fact follows Y obligation, nobody can say that Y obligation follows from X fact. Some legalists say that the dictums of the authority are the "efficient causality" between facts and legal effects. To the jurist this is not the case. Obviously someone had to convincingly argue that X fact is a cause of obligation so that X fact would be recognized as a cause of obligation. But this does not mean that X was not a cause of obligation before someone referred to it as such. The obligation was in X in the sense that X was more or less susceptible of being interpreted as a cause of obligation. This is true even in the case of silence or contradiction by the authority.[286]

Now if cause of obligation means justice in transactions, how do the various causes of the obligation express justice in transactions?

We begin with one interpretation. "A person who, willfully or negligently, unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom." Section 823 of BGB draws on private law-language. It says "A person," "unlawfully injures," the "right of another," "is bound" or has an obligation "to"… but we see beyond. The way in which the text connects these words and qualifies and complements them with key terms like "negligently," "compensate" and "freedom" suggests that the text is intended to specify corrective justice. Briefly put, delict assigns a compensatory duty to any person who, maliciously or imprudently, trespasses the limits of her right to injure the body, health, freedom,

[285] See Introductory Part.1.

[286] See the discussion in 4.1.5 and 4.2.3.3.

property or, in general, a thing within the limits of another's right. The obligation hence is placed to correct a right violation.[287]

The delicts in the BGB do justice to illicit interactions. One would expect to see a similar conception of contract in the BGB, where tort and contract are species of the same genus.[288] The BGB does not define contract however. But there are versions of the juridical conception of contract. In the juridical conception, contract is about exchange of rights. Before the contract, I see you as the owner of the thing I want and you see me as the owner of the thing you want. In the contract we agree that each one will transfer to the other what the other wants. Injustice in this licit or pacific interaction occurs when one party refuses to give what the other has acquired. One can read this conception of contract in Art. 1101 and 1131 of the French Civil Code. The former says: "A contract is an agreement by which one or more persons obligate themselves toward one or more others to give, to do or not to do something." The latter says: "An obligation without causa, or with a false causa or with an illicit causa, cannot have any effect." Causa is the thing the debtor wanted from the creditor and acquired through the contract.[289]

4.1.3. The conditions under which private law obligations arise

What does a cause of obligation look like? There are theories of just contract law and of just tort law.[290] There is even a theory of the emerging juridical category of unjust

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[287] The German system of tort law differs to others like the French and Italian. Whereas German tort law establishes certain protected interests, setting out numerous clausus in relation to these interests by which the infringement of the protected interests only gives rise to a corrective obligation, the French model establishes a general principle, establishing a kind of atypicity of the protected interest, by which every damage occasioned by a intentional or negligent conduct gives rise to a corrective obligation. In my view, these two theories must be seen as complementary. Whereas the French system establishes the principle of tort law, the idea that you must correct all damage wrongfully caused to another, the German model specifies this principle in readily applicable concepts (please see 4.1.5.1). Interestingly enough, we are told that the jurisprudence of France and Italy apply the more down-to-earth approach of the Germans. There is an "orientation of the scholarship and the judges towards a "selection" of the interests deserving care […] The "selective" technique consists of a reduction of the [idea of] illicit fact to [various] illicit types." Pietro Rescignio, "Obbligazioni (dir. priv.)," in *Enciclopedia del Diritto*, t. XXIX, Giuffrè, Varese, p. 155. See more in 3.2.2. and the theory in 4.1.3.

[288] See 4.1.1.1.1. (e) and the doctrine elaborated in 4.1.1.3.

[289] Three facts indicate that voluntary obligations arise only in exchanges. Firstly, donations are not regulated among the sources of the obligation; they are regulated before them, after of the *mortis causa* succession (Title I) and together with testaments (Title II: Of donations during life and of wills). Secondly, even if the general definition of contract (Art. 1011) seems to suggest that contracts could be gratuitous, Art. 1131 says that, to obligate, contractual obligations must have a lawful causa; in other words, be reciprocated by a valid consideration. Lastly, Art. 931 requires that "All acts importing donation during life shall be passed before notaries," namely before the representatives of the state, which means that enforceable donations are not a privates' affair.

[290] Peter Benson, "The unity of Contract Law," in Benson, Peter (ed.), *The Theory of Contract Law: New Essays*, Cambridge University Press, Cambridge and New York, 2001, pp. 118-205 and Ernest Weinrib,

enrichment.[291] But there is no systematic exposition of the legal category by which contract, tort and unjust enrichment are particulars of the same kind. I need such a theory.[292] I need to have a clear image of the constituent parts of the cause of obligation because my endeavor seeks to determine a new particular of this kind. And I cannot use the theory of a particular cause of obligation, for if I mould the interested promises with the abstract form of contract, tort or unjust enrichment, I would be either denaturalizing the interested promises or deforming the chosen form, which is something we want to avoid.[293]

So, once again, what are the features that a transaction must exhibit for it to look like a cause of obligation, or what are the conditions under which obligations arise?[294]

4.1.3.1. THERE ARE TWO PRIVATE LAW PERSONS

The concept of cause of obligation presupposes two persons and, to be one of these persons, to be able to participate in a cause of obligation, an entity must in principle pass three tests. These tests require free will, independence and separation. Let me develop briefly.

Having free will is the first requisite. Someone under an obligation to do something is someone who has, as the classical definition puts it,[295] to do something by legal necessitation. Now, a condition for the law to impose a duty to do X on someone is that it

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The idea of Private Law, Harvard University Press, Cambridge Mass., 1995, Chapter 6 "Negligence Liability" and Chapter 7 "Strict Liability".

[291] Ernest Weinrib, *Corrective Justice*, Oxford University Press, Oxford, 2012, Chapter 6 "Unjust Enrichment".

[292] The closest to what I require is Peter Benson, "Misfeasance as an Organizing Normative Idea in Private Law," in *University of Toronto Law Journal*, 60, (2010), pp. 731-798, from which I draw to a considerable extent.

[293] Explaining the interested promise in terms of an existing legal concept denaturalizes the interested promise. However, as the law leaves the interested promises without legal explanation, individuals demand the law to order the issues arising in interested promise scenarios. And if the law orders such issues with the existing legal concepts, the law deforms the existing legal concepts. This is more or less the argument of Part 1 and Part 2.

[294] This is not an exercise of induction. Induction would consist of generalizing the common features of contract, tort and unjust enrichment. What I am doing here is, if you wish, an exercise in transcendence. I am distinguishing experience from form in the causes of the obligations. Transcendence believes that every fact of law is a fact of law due to a form of law, which is beyond the given law, and thus can be distinguished, "forming a potential centre for an indefinite number of other [legal] experiences." Giorgio Del Vecchio, *Formal bases of law*, *op. cit.*, n. 55, p. 76. What I am looking for is knowledge of the conditions under which all possible just cause of obligation could be explained. It is an insight into the nature of one and every just cause of obligation, "that while it is the condition of being for that object, it is likewise the condition of an indefinite number of similar objects." *Idem*.

[295] Justinian, *Institutes*, I. 3, 13 Pr.

is possible that X will never occur and that the occurrence of X depends on the debtor. So the debtor must be able to make X occur. Hence the free will requirement, by which an entity must have proven that she, he or it is able to modify the world in pursuit of self-made projects (to do X).

Someone is independent when she is recognized as the owner of certain choices, as someone who can exclude others from deciding for her in specific areas. The slave is not such a person, and for that reason, he could never be a victim of his master's wrong. A norm establishing that a slave could demand corrective obligations of the master would be self-defeating. If the slave demanded the master to compensate him the damage that he suffered at her hands, the master would be able to demand the slave to release her. The only obligation is between master and slave, establishing that the slave must do what the master says. Even if the slave has free will, everything the slave does is conditioned by the master's approval.

Someone is separate where her or his deeds are imputable only to her or his name. Woman and man are independent in the French Civil Code. Yet, when married, they cannot engage themselves in contracts, and this makes sense. Marriage (or the community of goods) implied a transformation: From a "she" and a "he" they became a "we." And contract implies that one party loses something that another acquires. Now, if my disposition of my goods is at the same time a disposition of your goods, how could you be said to have acquired something? The persons of the obligation must be separate from the beginning of the obligation to its end. If I happen to acquire a credit X that Demetrio had as against you and I then give you this credit in payment of a debt I owe you, you are no longer a debtor of the credit X, for you cannot be both debtor and creditor of the same credit.[296]

Legislation on contract, tort and unjust enrichment are so explicit on the bipolarity of the causes of obligations that they generally name the involved persons with correlatively related names, or statuses. Tort law talks about a "tortfeasor" and a "victim," which means that there cannot be a tortfeasor without a victim or victim without tortfeasor. Contract

[296] "When the capacities of creditor and of debtor are united in the same person, a merger [confusion] is made by law which extinguishes the debt." French Civil Code, Art. 1300. More examples could be added: Where two distinct assets (patrimonium) come to belong to one person, as when one person inherits the whole assets of another, the law tries to link each asset to different persons. Where the agent is interested in acquiring something from the principal, as if I wanted to buy the house I was commissioned to sell, the contract is valid only insofar as I paid the prize established by the principal; there is no space for discretion here.

law goes even further. It not only has a general law of "offerors" and "acceptors," it determines further the typical relations of "vendor" and "buyer," "loaner" and "loanee," et cetera. The same occurs with typical unjust enrichments, like the negotiorum gestio, which is an interaction between the "gestor" and the "dominus negotii."

One could say that a personality-recognizing act precedes the formation of every cause of obligations.[297] The kiosk owner who asks the tobacco buyer for identification is recognizing the prospective buyer as a person before selling him the thing. In transnational private law, certain actors become of transnational relevance due to the fact that they effectuate transactions with well-established transnational actors. In receiving money from a natural person, Argentina is recognizing him or her as something like itself. From this point the individual has become a transnational private law persona, other transnational players will recognize her in the same manner as Argentina.[298]

4.1.3.2. EACH PERSON WITH A SPECIFIC RIGHT OVER A THING

Someone with a right over a thing is someone who can exclude others from doing something with the thing, like using it, enjoying its fruits, or disposing of it.[299] Persons come to the interactions that cause obligations with a *specific right over a specific thing*.

To illustrate, the victim of the tort of battery comes with a right over a human body. This right entitles her to exclusively use and even dispose of her body. The tort of battery consists of disposing of the victim's body without her authorization. When the defendant Y fractures the leg of the victim, Y is harming, indisposing the body of X. At the moment of the interaction, the defendant has or should have recognized the leg as that of the victim and therefore been aware of her duty not to dispose of it without the victim's authorization. We see this right as functional to the interaction because, for the interaction called battery to have taken place, the victim must have come with the so-

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[297] I think I took this idea from an unpublished article by professor Peter Benson, who generously shared it with me. The article was about the distinction between right in rem and right in personam. I cannot find it so as to double check and quote.

[298] Should other international actors impute international law obligations to private actors on the grounds that they have been dealing with bearers of these obligations? This is the question that Rebecca Schmidt and I tackle in an article under preparation.

[299] See Fernando López de Zavalía, *Derechos Reales*, Zavalia, Buenos Aires, 1989, t. 1, §3, pp. 44-63. Professor Benson would say that the persons who come to a cause of obligation are persons who come related in a twofold manner. First, in an immunity-disability relation, by which one owns some thing or interest and the other can do nothing but to recognize that, and secondly, in a duty-right relation, by which the owner has a claim to exclude the non-owner from use, fruit and disposition of the owned thing. Peter Benson, Misfeasance…, *op. cit.*, pp. 751-777, especially at p. 766. In the text I avoid this two-steps analysis and begin straightforwardly with the duty-right relation.

called "right of bodily integrity." In the absence of this right, a situation difficult to imagine, though nonetheless possible, the tortfeasor would have violated nothing. [300]

Suppose now that I have the "right of usufruct" over the stable of Danielle. This right entitles me to use and enjoy the fruits of a thing of which I cannot dispose; the right of disposition of the thing belongs only to Danielle.[301] In a case where you have taken a horse without my permission, applied it to the satisfaction of a personal need, fed it and left it unharmed in the same stable, you have unjustly enriched yourself at my expense. You have enriched yourself at my expense because I am the only one entitled to use and enjoy the fruits of that horse. The obligation to restitute would arise also in the event that the user was Danielle himself. So, to be entitled to claim unjust enrichment, you must have a right to a thing's fruition.[302]

How is it in contract? In a single act you give me the hardcover edition of Benson's *The Theory of Contract Law* and I commit to give you a critical review of that book. In the imaginary of transfers I took a book from your hand and you heard "I commit to review this book," spoken in my voice. We have two kinds of things here: a movable thing and a performance (or the image that I will do something for you in a given future). The first thing must appear to me as a belonging of yours, for why would I give you something of mine if I knew that the book I am receiving cannot be disposed except by another? If the latter situation is at stake, then I run the risk that the actual owner will come and take the book out of my hands through the argument that I took it knowing that its disposition belongs to him. The second thing must also belong to me with the exclusion of others! For why would you give me something of yours if you knew that the performance I am giving

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[300] Had Y agreed with X to play football, Y would not have been responsible for indisposing X's leg in some way, for in such an agreement, X implicitly agreed to expose her leg to the possibility that Y indisposes it through injury etc. Conf. Sir Frederick Pollock, *The Law of Torts*, Fourth Edition, Stevens and Sons, London, 1895, pp. 97-98:

> There are incidents, again, in every football match which an uninstructed observer might easily take for a confused fight of savages, and grave hurt sometimes ensues to one or more of the players. Yet, so long as the play is fairly conducted according to the rules agreed upon, there is no wrong and no cause of action. For the players have joined in the game of their own free will, and accepted its risks. Not that a man is bound to play football or any other rough game, but if he does he must abide its ordinary chances. Here the harm done, if not justified (for, though in a manner unavoidable, it was not in a legal sense necessary), is nevertheless excused.

[301] The very nice definition of usufruct provided by Dalmacio Vélez Sarsfield, the writer of the 1871 Argentinian Civil Code: "El usufructo es el derecho real de usar y gozar de una cosa, cuya propiedad pertenece a otro, con tal que no se altere su substancia." ("The usufruct is the real right to use and fruit of a thing which property belongs to another, provided that its substance is not altered.") Art. 2807 in 1871 Argentinian Civil Code.

[302] A similar solution in Kit Barer, "'Damages Without Loss': Can Hohfeld Help?," in *Oxford Journal of Legal Studies*, Vol 34, No 4, (2014), pp. 631-658.

you in exchange belongs to another, as if I came to our contract bound to work in exclusivity with your competitor?[303]

Both parties to a contract own the things they exchange in the sense that they have the exclusive capacity to dispose of these things. But the nature of these *things* could be very dissimilar, from a certain thing like a book to a quantity.[304] I will avoid the discussion of the legal nature of books to anticipate a notion that we will revisit in 4.1.4.3, 5.2.1.2 and 5.2.2.1.

(A) A RIGHT OVER MY DISPOSABLE FREEDOM

Freedom, understood as an ability to act in ways that hinder no one else's freedom, is in private law, something that I own to the exclusion of others. My freedom is mine in the sense that even if it has to do with my future conducts everyone must regard it as something of another and not hinder it, like for example making it possible that I do not study or work. Comprehended in this way freedom is what I will call a "right over my disposable freedom." This right contains the future I am able to dispose as a present asset in exchanges…

Let me introduce the concept with the book review example. Before our contract, I was free from an obligation to conduct the book review for you. I could have chosen not to do it, or to do it for another editor. No one could dispose of this freedom for me, as if a third unauthorized party promised you that I will do the work or made it impossible that I dispose of that choice of mine by harming my reputation. Now, when I made a contract with you I parceled, as it were, a part of my disposable future. Of the universe of things I could do in the near future I specified, parceled, as it were, a choice, which you made yours by giving me your book. As your possibilities related to your book passed to be mine, my possibilities related to my choice to do the research passed to be yours. I am no longer able to do things that could hinder my conducing of that research. I must, in other words, do what is reasonable to "conserve"[305] your choice.

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[303] If you were my employee and I wanted you to perform one of the tasks contemplated in our labor-relation, I would not approach you as a contract party, as someone who has something I desire and is willing to exchange it for something I have. For why would I want to offer you something in exchange for something that you already owe me?

[304] The best essay on things in law I had the opportunity to read is Salvatore Pugliatti, "Cosa (Teoria generale)," in *Enciclopedia del Diritto*, t. XI, Giuffrè, 1962, Varese, pp. 19-93.

[305] I take the word from Fernando López de Zavalía, *Derechos Reales*…, *op. cit.*, §3, VI, 3., p. 58.

4.1.3.3. THE TWO PERSONS INTERACT

If the causes of obligation presuppose two persons with rights, they consist of a *legal* act or *interaction*. The latest scholarship investigating the features or morphology of legal interactions proceeds in this way: They identify the facts that a norm makes the condition of an obligation, dissect them from the obligation and characterize them. In other words, they read positive law as a fact of nature and, even if they use "intention," "act," "declaration" and related juridical concepts as analytical categories, they limit themselves to characterizing what they see in the positive law, sometimes modifying the analytical categories to make them house the facts described in the law. So it is that some obligation-producing-facts would appear as "facts," "unilateral acts," "non-receptive declarations" and other forms that, from the perspective of juridical private law, can never give rise to obligations.[306]

The scholarship of just private law can be nothing like this. If the just private law says that the causes of the obligation presuppose two persons with rights over things, what can it say about the interactions that cause obligations? What juridical conditions make an interaction qualify as a cause of obligation?

(A) ON PRIVATE LAW CONDUCT

We understand conduct as "the outward expression of an inwardly determined purpose."[307] There are various classifications of the acts of will in private law.[308] The most

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[306] An example of this scholarship is Ludwig Enneccerus, who classifies the obligations in a paragraph that looks like an index to the provisions of the German Civil Code:

> The obligations arise: out of the legal transactions, of the acts akin to the legal transactions and of the real acts; of the illicit acts; of the un-faulty acts which nonetheless obligate to pay a remedy; of certain states of legal or factual nature, for example, of the real rights, of the family rights, of the hereditary law and of the unjust enrichment. The obligations that arise out of legal transactions are divided in obligations arisen out of a contract, of unilateral promises and of testamentary dispositions. The obligations that arise out of the contracts not only are sensibly the most frequent and important, but also the rules of the contractual obligations are applicable to the other obligations that arise out of legal transactions, whenever the unilaterality of these legal transactions or their special nature results no deviation.

Tratado de Derecho Civil, t. V: Obligaciones, Blas Pérez González and José Alguer translation, Bosch, Barcelona (?), 1934, p. 138.

[307] Ernest Weinrib, *Corrective Justice…*, *op. cit.*, p. 23.

[308] The tradition consists in classifying intentionality according to its intensity. The famous or historical classification is that which divides culpa in "dolo", "culpa grave" or lata, "culpa leve" and "culpa levissima." It is important to notice that the classification of intentionality must be contingent—changing within what it contains it. In this sense: "We can define will as the primary and irreducible principle of subjective being which develops in the world of the senses. Its development varies in form, because will changes with the degree of perception from the blindest instinct to the most deliberate knowledge. And yet its differences and distinctions rest on a substantial unity. Will, like life itself, is one and continuous in all its manifestations." Giorgio Del Vecchio, *The formal bases of law*, *op. cit*, §92, pp. 131-130.

common today divides them into "intentional" and "negligent" acts. Contractual agreement offers an example of what legal intention is.[309] The parties exhibit to one another that they definitively want to endorse the planned exchange. Tort law provides a very good example of what negligence is.[310] The tortfeasor does something that a reasonable person could and would have chosen not to do. The absence of will makes behavior "unintentional." If the act is unintentional then it cannot cause an obligation. A person selling under illegal threat has no definite intention to exchange rights; an insane person driving over the speed limit is not committing a negligent act. This means that, if we want to argue that a behavior is a private law act, we must first prove that, in some sense, the agent chose it.

It is crucial that the inner experience of choosing or being able to choose be otherwise discernible from the legal act or its circumstances.[311] The party to the contractual agreement must be able to tell from the agreement and its circumstances that the other party intended more or less the same idea of contract that she intended. The antecedent and posterior conducts of the tortfeasor and the tort circumstances must show the claimant, defendant and any other reasonable observer that the tortfeasor could have chosen to act diligently as opposed to negligently. One is able to tell that another is choosing something or is able to choose otherwise due to significant facts like words, body language, etc. These social facts mediate between the crude reality and the internal life of the other. Sometimes the observer must be specialized—I have to know of yoga to be able tell that your movements intend to manifest the figure you are representing in your mind. Other times the observer must solely be acquainted with the dictionary of everyday life; the culture mediating basic subjective experiences and signs, from want to aversion, to sadness and cheerfulness.

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[309] On the conception that I follow: Peter Benson, "The Unity of Contract Law," *op. cit.*, pp. 141-144.

[310] On the conception that I follow: Ernest Weinrib, *The idea of Private Law*, *op. cit.*, pp. 147-153.

[311] The characteristic of the exteriority of law is not appropriate if with it one wants to delimit the field of application of the law, but it is if with it one wants to designate the direction of the juridical judgment: Morality is directed exclusively to the intention, while vice-versa, the law takes into consideration the intention, and identifies in it only the possible source of external action" So law cannot attend to the actions that demand consideration only as manifestations of an intention, "according to the measure of not that what they operate but of what they signify, for example, as 'demonstrations of love' or 'manifestations of friendship'. Owing to this it is that the relationships whose essence lays not in the external behavior but in the intention from whom that behavior gushes out cannot be regulated juridically, thus the relations with God, the beloved, the friend. From this the abolishment of the punishments for heresy or apostasy, from this the juridical irrelevance of friendship." Gustav Radbruch, *Introduzione alla scienza del diritto*, Dino Pasini and Carlo Agnesotti translation, Giappichelli, Torino, 1961, p. 81.

Let me clarify this:

(B) NOT EVERY HUMAN CONDUCT CAN BE RELEVANT FOR JURIDICAL PRIVATE LAW

Not all conduct demands the attention of private law. Think of this scenario. I uproot a spruce to use it as my Christmas tree. This is an intentional deed. But if the spruce is mine, as if it happed to be rooted in my garden, my uprooting of it has no significance in private law. In private law, everything separable from my land, like a tree, is mine and, as mine, can be used and abused as I wish. This means that no one can reproach me for my doings with my spruce.[312] Conduct is relevant for private law only if it involves another, as if the spruce was not in my own, but in your garden.

We now make an affirmation:

(C) THE CONDUCTS THAT ARE RELEVANT FOR PRIVATE LAW ARE THOSE THAT CAN BE RELATED TO THE CONDUCT OF ANOTHER PERSON

This affirmation obeys the principle of *alterity*,[313] which in the field of the obligations says that whoever is to be a debtor or creditor must in some mode participate in the conduct from which the obligation arises.[314] The reasoning is this: Private law has established a world where persons do what they want within their provinces. The establishment of this world presupposed reciprocal renunciations by physiologically free egoists; e.g. I renounced my physiologically free choice to eat the apples of the tree you planted so that you renounce your physiologically free choice of entering the house where I live. In this context, if you are going to be entitled to make a demand other than the ones that we have already established, like that I must let you pick apples from my tree, you must, *to begin with*, prove an act of mine in connection with your conduct or sphere of rights.

We have already studied the most relevant modes in which private law works out the connection of conducts that ground obligations (See 3.2.1). I now want to classify them in two parts: bilateral interactions and unilateral interactions.

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[312] Kocourek calls this situation "freedom." "Freedom is not a legal relation because it is one-sided. A relation always involves two elements or two sides. Freedom is protected by the law by various Claims and Powers, but in itself it is not within the law. It is rather the end of law. Where Freedom ends the law begins, and where the laws ends Freedom begins." Albert Kocourek, *Jural Relations*, MacMillan, Indianapolis, 1927, p. 22.

[313] We spoke of the principle of alterity when we separated law from morality: Introductory Part.1.

[314] "Only where there were a plurality of individuals, whose respective actions meet or interfere in a common means, there can be place for the application of whatever juridical criteria." Giorgio Del Vecchio, *Il concetto del diritto*, Zanichelli, Bologna, 1906, p. 71.

(D) BILATERAL INTERACTIONS

Private law works out the bilateral interactions in several modes. The bilateral act *par excellence* is the contract. The contract is perfected and the obligations emerge when the offeree says to the offeror, "I accept your offer." Although one first makes the offer and the other afterwards accepts the offer, there is a moment where they do something together. We call this moment "agreement," expressions like "meeting of the minds" and "the iter of the contract" are also used. Other bilateral interactions appear outside of the law of obligations, like the act of conveyance (or tradition) of the law of *in rem* rights and marriage of family law. It would be productive if, in the field of the obligations, scholarship typified the conditions for the formation of the so-called "relational contracts."

(E) UNILATERAL INTERACTIONS

A widespread opinion holds that acts in private law can be conducts of persons in solitude.[315] Someone who stamps a reward announcement on a German public wall is someone who is performing a unilateral legal act, for §657 of the German Civil Code institutes such conduct as the antecedent of a legal effect and the conduct itself is about one person doing something alone. Scholars who talk about unilateral acts in this sense are scholars who think of private law in public law terms. Certainly, since the state meddles in the relations of its citizens, the state can say that from the unilateral conduct of one arises a right for another. Here then, my conduct could link us regardless of its interference with you. Whether this is unilateral conduct or not,[316] for the reasons given in 3.2.1, it cannot be accepted as an act of private law.

Having said that, private law does have room to talk about unilateral acts, or better: "unilateral interactions." The case of intentional damage is a good example.

I, for some reason, smash my neighbor's car. Did I establish a relation with *him*? He was absent at the time I was damaging his car. He came to know of the sad event when the tort had been committed. Are we to say that the tort occurred when he noticed it? No. The way

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[315] See the works discussed in 3.1. For a discussion on the many legal senses to which unilaterality can be applied: Martin Hogg, *Promises and contract law: comparative perspectives*, Cambridge University Press, Cambridge and New York, 2011, pp. 35-38. For an extensive treatise on the unilateral legal acts, see Carmine Donisi, *Il problema dei negozi giuridici unilaterali*, Jovene, Napoli, 1972.

[316] I pose doubts about the unilaterality of this conduct because its legal relevance is due only to its being established as the antecedent of a legal effect by the legal authority. Accordingly, X incurs in the obligation to act in accordance with the program of conduct prescribed in the paper that X posted on the public wall because X's state said that anyone doing that act would incur in a voluntary obligation, the relation being forged between any-doer-of-that-fact and the state.

in which private law thinks is as follows: In destroying something that belongs to another, I destroyed another; for the things of others are like extensions of their personalities. So, even if this conduct may (from one perspective) look unilateral, it is (from the private law perspective) a legal interaction, an act between two persons.[317] We refer to this interaction as unilateral because there is only one agent taking action. In our case, it is the tortfeasor who intentionally smashed the other's car.

But torts are not the only cases of unilateral interactions. As we will see in 4.1.4.3 (b)-(c), there are licit unilateral interactions too.

One could say that conduct on the part of the victim of a tort is unnecessary because tort is about the violation of an acquired right. A violation of a right can be a unilateral interaction but the acquisition of a right cannot. Licit causes of obligation cannot but be bilateral in the sense of bilaterally active acts.[318] But then one must explain, why is it that the legatee acquires a right to the legated object without accepting it, why is it that the offeree acquires a power to accept the offer without expressing a will as to the unilaterally transferred power, why is it that the promisee of a promise to pay an unenforceable debt actualizes his claim with and only with the promise? What I am doing here is making space for a category that could explain these legal phenomena. I will work out the category's brightest type in 5.3.2 and 5.3.3 before justifying it in 6.1.

4.1.3.4 THE INTERACTION IS NOT A SIMPLY LICIT INTERACTION

A legal phenomenon (or interaction) is something that leaves traces in the world of senses and can be interpreted as implying two persons in relation. But not all legal phenomena are relevant to the law of obligations. We need to say something about the "simply licit interactions."[319]

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[317] The victim was interfered with by the tortfeasor—though passively, he participated in the tort. Another even more interesting form of unilateral interaction is depicted by the *negotiorum gestio*. See 3.2.1.

[318] For a version of the argument please see 6.1.

[319] For a very instructive discussion of simply licit activities in the common law see Peter Benson, "Misfeasance…," *op. cit.*, pp. 734-743, where professor Benson discusses the cases of rescues denial, pure economic loss and non-legal issues between neighbors. These cases are even more interesting than the illustrations of the text because they are about interactions where a person does something that she knows will result in a loss to another and yet the other has no action to claim recovery of the loss. With these examples professor Benson takes what I call simply licit activities to its limits. Let me quote Benson:

> Despite the differences between the rescue, pure economic loss, and nuisance scenarios—the first involves factual 'omissions' and physical loss whereas the second and third involve factual 'acts' and financial loss—there seems to be a common thread: in these no liability situations, the defendant's conduct does not affect an interest rightfully belonging to the plaintiff *to the exclusion of the defendant*. The existence of such an interest and of conduct possibly affecting it seems, then, to be a prerequisite of the defendant owing a duty of care

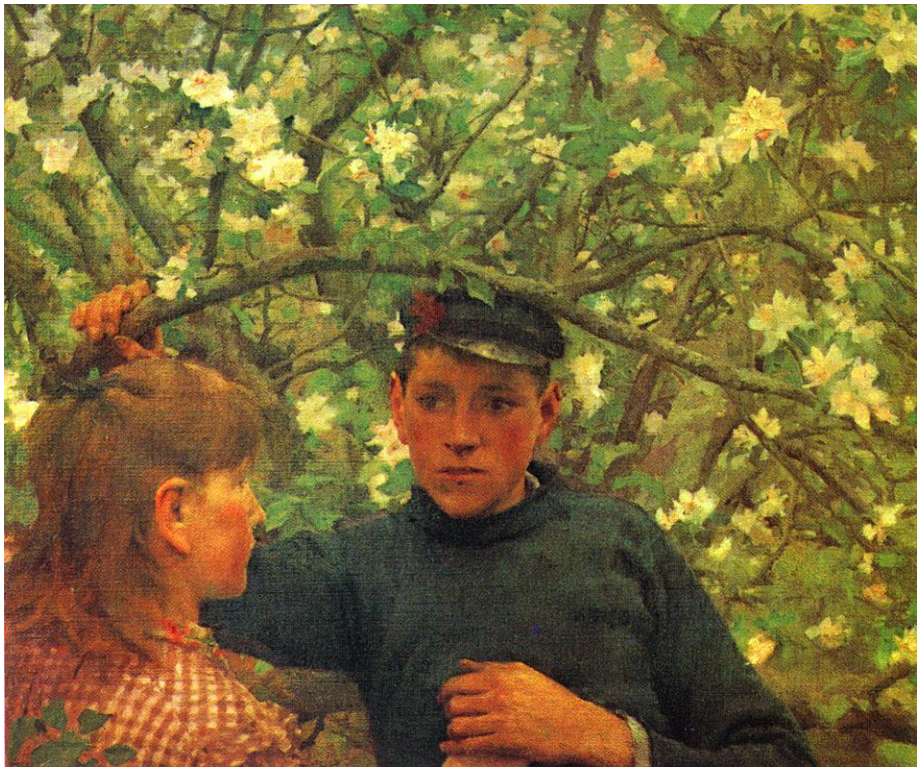
I am having lunch in a restaurant with another person. You could interpret this situation in a manifold of legal ways. One interpretation could be that we are a contractual party and the owner of the restaurant (who is represented by the waitress) is the other contractual party. This legal interpretation would be relevant to the law of obligations. But the following interpretation would not be relevant: there are two persons; these two persons come to a meeting with a bundle of rights and interact, no one affecting the other's rights. Private law identifies no obligation-creating act. Indeed, this interaction seems to have no legal effect at all. Yet private law names it. It calls it a licit interaction. Why? Well, one may make undue disclosures to the other and violate a third party's right, or as one goes to the toilet, the other profits' from a thing of hers. We need to see seemingly insignificant interactions as private law phenomena because they constitute the arena where a successive, relevant legal phenomenon may happen to occur.

What is more, typical simply licit interactions could be *instrumentalized* as a defense to a wrong accusation. Take the simply licit interactions called "pourparlers" and "Punkctuation."[320] The pourparlers are, in French private law, the conversations oriented towards the formation of a contract. This person and I meet in a coffee shop to comment on each one's needs and brainstorm how we could cooperate. We agree that we could exchange things. We talk about the possible terms and conditions of our contract. We made a pourparler. The German Punktuation refers to a further possible step in the pre-contractual dealings. We take a piece of paper and outline the main points of the prospective contract. This written paper does not look like a contract. It misses our signatures. The significance of the pourparlers and the Punktuation is exactly that they *do not* create obligations. If private law characterizes and names them it is for giving them the prefabricated value of inoperative acts. Why would private law concern itself with determining an inoperative concept? I think the reason is efficiency. X introduces a first draft of a contract as conclusive evidence of a contract claim. Because private law cognizes that the Punktuation is not a contract, the defendant can say, without too much elaboration, "this is a Punktuation, it is not sufficient proof of a contractual agreement."

> toward the plaintiff with respect to any loss caused, whether it be physical or purely economic, and however foreseeable that loss may be [....] On this view, we may say provisionally that nonfeasance is conduct that does not affect or otherwise interfere with a substantive interest (one's body or things) that belongs to the plaintiff to the rightful exclusion of the defendant.

Idem, p. 743 (italics in the text.)

[320] See the distinction in Fernando López de Zavalía, *Teoría de los contratos*, t. 1, 4th ed., Zavalia, Buenos Aires, 1994, §7, II, 2, pp. 165-167.



The promise, by Henry Tuke (1888) covers Martin Hogg's book Promises and Contract Law. In my view, the picture perfectly casts the sort of situations from which private law should abstain. Look at the boy's face: Is he transferring a right, contracting an obligation, creating a legal relationship, or whatever metaphor we choose to speak of private law? The boy may be making a promise, but not a legally intended one. This man is showing love and she gets it. The promisee is being promised by a lover, not a private law persona.

4.1.3.5. THE INTERACTION AFFECTS THEIR RESPECTIVE SUBJECTIVE RIGHTS

A person with a right; as long as every other person respects this picture, everything runs smoothly in private law. In other words, no one can reproach anyone else. One may place oneself at the limits of another's right, as if I were to offer you something or run fast in the city center.[321] In these interactions I am at the limit of affecting my own and your rights. The causes of the obligations are the interactions whose significance is to alter the rights of the interacting parties.[322]

Taking a tree from another's garden is an interaction whose significance is to affect the interacting parties' rights. To me, my neighbor appears as someone with a right over his garden. Nobody can enter without his authorization, far less interfere with parts of his dominium. As I step into his garden I begin to affect his right. I am affecting his right in the sense that I am using his space, trespassing upon his dominium. But my act affects *my right too*. In getting into his space I used more space than I ought. This is an unrighteous conduct, a conduct beyond the limits of my own right. The subjective rights are so portrayed that for one to affect another's right one had to affect one's right too. The idea becomes clearer when I am seen enjoying the new Christmas tree.[323]

I will give you my watch and you will give me €100. Agreeing to those terms is to make a contract of sale, the significance of which is to alter the rights of the interacting parties. By this act, as it were, you become the owner of my choice to transfer to you dominium over my watch. I used to be able to do whatever I wanted with my watch. Now I cannot do anything that could impede its being transferred to you, my creditor. And the contract has

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[321] See the running case in 4.2.3.3.

[322] Maybe it is time to proffer an answer to this question: What do I mean by cause of obligation? A cause of obligation (or obligatory interaction or transaction) is the normative fact from which an obligation immediately emerges. It is a fact because it is observable, hearable, it can be perceived by our senses. It is normative, at the same time, because it is expressive of a juridical relation. It can be interpreted as the violation of a right or commutation of rights and therefore as the cause of the pertinent correction or enforcement. And the obligation emerges immediately from that normative fact, without further deliberation, because, ex hypothesis, the fact is another instance of a predetermined normative phenomenon or typical cause of obligation. It is another more battery or sale. A *specific* cause of obligation thus "is not like a far and generic thing but that which effectively gives place to the emergence of the legal tie, that force which imposes the duty which forms the content of the obligation." Antonio Scialoja, "Le fonti delle obbligazioni," in *Rivista di Diritto Commerciale*, Vol II, (1904), parte prima, pp. 520-530, at p. 527. I find it useful to translate the entire idea of the author:

> The precept neminem laedere can be employed as ground of the legal obligations [in my classification: the violations of rights] or of all the obligations [...] But that precept is not the source of the obligation, it can only be the justification of the obligatory relations. Source of obligation in legal sense is not like a far and generic thing but that which effectively gives place to the emergence of the legal tie, that force which imposes the duty which forms the content of the obligation.

[323] A further development of the same idea in 3.2.2. and 4.2.3.3.

implied an alteration of your sphere of rights too. You have a right to demand of me that I transfer you dominium over my watch. Before, you had no right as to that choice. Now, you can decide whether to demand performance or not. Your status quo has been altered for the "good," which means that you now have more options. But for your right alteration to be perfect, a just private law not only requires agreement to the fact that I will give my watch. A just private law needs to see reciprocity. It demands that the one who has altered his rights for the good also alters his rights for the bad, or good of the other. This is why ours was a valid contract; because the prize you paid reciprocated the thing I sold you.

It is worth noting that the emergence of an obligation adds nothing to the total sum of things belonging to persons in a private law society. For example, if the act by which a person invents something that had not existed before implicates both ownership for the inventor and a new certain thing for the world of private law, the act by which a person obligates herself to do something does not bring something new to the world but merely changes the obligated thing's status quo. Before the contract it was purely mine; after the contract I must give it to my creditor, however the thing has always been. So my enforceable promise to give you a house in March 2020 entails not that a new house will happen to exist in March 2020 but that the house that is now mine in fact or potency will become yours in March 2020.[324]

4.1.3.6. THE RIGHTS ALTERATION IS A RIGHT VIOLATION OR A RIGHT COMMUTATION

I elaborate this bi-member classification for the following reason. If the interaction at stake is not a simply licit interaction, the interaction is one that affects the rights of the interacting parties. And I cannot imagine modes of affecting rights that are not either (prohibited or) illicit or (permitted or) licit. The illicit causes of the obligation then consist of interactions where one party violates the rights of another. The licit causes of the obligation consist in interactions where two parties commute rights over things.[325]

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[324] Inspired by this statement: "Relative rights differ from absolute rights in this, that the former add nothing to the sum or aggregate of humans rights; for what an obligation confers upon the oblige is precisely commensurate with what it takes from the obligor. Absolute rights, therefore, make up the entire sum of human rights." C. C. Langdell, *A Brief Survey of Equity Jurisdiction*, Harvard Law Review, Cambridge, 1908, p. 3.

[325] I follow the bi-member division established by Gaius, *Institutes*, III, 88, probably inspired by Aristotle, *Nicomachean Ethics*, *op. cit.*, Book V, Chapter 2, §13. The same division in Jean Domat, *Les loix civiles dans leur ordre naturel*, t. II, Paris, 1691, p. 2, who probably influenced the French Civil Code's meta-division of contractual and extra-contractual obligations (Title III of the Book 3 deals with the contracts and the obligations in general and the Title IV of Book 3 deals with the obligations that arise "without agreement," as we read in article Art. 1370).

Of the modern writers, I am especially inspired by Marcel Planiol, "Clasification des sources des obligations," in *Revue critique de legislation et de jurisprudence*, n. XXIII, Paris, (1904), pp. 224-237. In

4.1.3.6.1. A CORRECTIVE OBLIGATION ARISES WHEN THE RIGHT'S ALTERATION IS A RIGHT VIOLATION

(A) IN A RIGHT VIOLATION ONE PARTY LOSES WHAT THE OTHER GAINS, AND THE LOSER UN-WANTS OR DOES NOT WANT THE RIGHT ALTERATION

In illicit interactions one party loses what the other party gains. Example: what the thief gains is what the victim loses. But there are interactions where the same thing occurs and there is no right violation, like donations. What makes them differ? The difference is obvious, the former are illicit interactions and the latter are licit interactions. But what makes an illicit interaction illicit? Or what qualifies an act that alters the party's right as a right violation? The private law's answer is this: whoever suffers the alteration for reduction "unwants" *or* "does not want" the reduction. [326]

Planiol, all the obligations derive from two sources alone: Contract and the law. In the absence of a contract, the obligation would never arise out of the free will of the legislator. When the legislator establishes the cause of an obligation it is because it has identified a circumstance related to the person or patrimony of the creditor that makes it necessary. This circumstance is always an unjust injury, which the legislator seeks to prevent if it has not yet occurred, or to repair if it has already been done. The obligations grounded in future injuries are all the obligations that the classical classifications include in the category of legal, as well as the obligation to continue with the work of the gestor who benevolently intervened in another's affairs. The obligations that arise from injuries already done to the person or patrimony of the creditor include those where the damage has been intentionally caused (the delictual obligations), those where the damage was caused by negligence imputable to the tortfeasor (quasi delictual obligations) and the quasi-contractual obligations based on the enrichment for which the debtor can allege no cause. Such enrichment is also a form of injury, for when there is enrichment for only one there is an injury for the other.

In a similar vein Michele Giorgianni, who says: "In our view, a worthwhile classification of the obligations under the profile of the sources could probably be only that which distinguishes between the obligations so-called contractual and the obligations so-called extra-contractual, or rather in between those that derive from a fact or act which has the virtue of imposing an obligation in charge of a determinate subject and in favor of another determinate subject (according with the proper physiognomic characters of the obligation) and those that instead derive from the violation of a rule of conduct placed for the protection of the generality of the consociated. This distinction holds, as it is known, a preeminent importance on the field of the "responsibility", where different rules are applied to one or the other category." In his very rich essay: "Appunti sulle fonti dell'obbligazione," in *Rivista di Diritto Civile*, I, (1965), pp. 70-75 at pp. 74-75. The same reduction is made in Peidró Pastor, "Pluralismo y dualismo en el problema de las fuentes de la obligación," in *Revista General de Legislación y Jurisprudencia*, Vol 197, (1954-Julio-Diciembre), pp. 385-421, especially at pp. 404-411 and José Ferrandis Vilella, "Una revisión crítica de la clasificación de las fuentes de las obligaciones," in *Anuario de Derecho Civil*, Vol 11, No 1, (1958), pp. 115-146, especially pp. 140-1.

Scholars studying the prehistory of this classification have asked: Which obligation arose first, contractual or the delictual? This question, when asked in the present, could be of great utility to the private law theorist, for it raises the issue of whether we need consensus to have a legal regime or not. On the other hand, historical answers could be very informative in the sense that they offer images that the theorist can articulate in theory. For an interesting account of the prehistory of the obligation: Silvio Perozzi, *Le obbligazioni romane*, Ditta Nicola Zanichelli, Bologna, 1903.

[326] This is how I dare to solve the question without involving the state. My predecessors, whose contexts were radically different, could solve it by invoking the state's will: "The differential note of this category

Even if the victim were not there to show opposition to the trespass, nobody would say that she wanted her neighbor to enter her land and uproot a spruce. Rather the opposite, we think that the victim, as the exclusive owner of something, *un-wants*—in the sense of dislikes, which is stronger than does not want—that other persons use and dispose her things.

A strong rain ruins my house's bench and I am on holidays. My neighbor cannot contact me and decides to fix it. The phone bill arrives home and, once again, I am on holidays. The cleaning lady finds it unnecessary to bother me and decides to pay these debts for me. In the *negotiorum gestio* scenarios, the gestor looses what the *dominus negotii* gains; namely, the cost of solving the issue. Nobody would say that people go around paying other's bills or arranging other's misfortunes out of charity. Nobody could say that the *gestor* wanted the *dominus negotti* to receive a benefit without paying for it. We think that people generally *do not want* (now, yes… do not like) to help others gratuitously.[327]

There is no illicit cause of obligation where who loses something consents that another should gain it. The person who watches her neighbor taking home a spruce on Christmas Eve is someone who wants the neighbor to gain what she loses. The neighbor who fixes my bench while I am at work is not someone who is taking charge of my businesses in an extraordinary event. We cannot say that he does not want to make me gain what she loses.

[illicit acts] to the precedent [the licit acts] is that they, instead of being consented, are prohibited by *the legal order*: thus, once performed, they produce legal consequences, not in accordance but in contradistinction to the interest of the actor. The illicit acts hereby considered are those contrary to *a norm of civil law*, and therefore, as a general rule, detrimental to a subjective right of a person, from which it emerges a damage, that the actor is obligated to compensate." Francesco Santoro-Passarelli, *Dottrine generali del diritto civile*, 9th ed., Jovene, Napoli, 1966, at p. 109, (notes omitted; italics are mine).

[327] The writers of Justinian, *Institutes*, 3, 27, 1, explain my point thus:

> The reason of this is the general convenience; otherwise people might be summoned away by some sudden event of pressing importance, and without commissioning any one to look after and manage their affairs, the result of which would be that during their absence those affairs would be entirely neglected: and of course no one would be likely to attend to them if he were to have no action for the recovery of any outlay he might have incurred in so doing.

Intervening in another's affairs could be a nice thing to do. But I characterize it as an illicit interaction. It is an illicit interaction because of the injustice that it produces. The dominus negotii ends up with a value that the gestor lost without wanting to confer. I am here inspired by Planiol, who said:

> On peut donc tenir pour certain que dans le quasi-contrat la cause réelle de l'obligation n'est ni un fait volontaire, ni un fait licite; c'est un fait involontaire et illicite. Ceci revient á dire que l'expression quasi-contrat est tout à fait fausse; il n'y en a peut-étre pas, dans le droit tout entire, une seconde qui puisse rivaliser avec elle en impropriété.

Marcel Planiol, "Clasification des sources des obligations," *op. cit.*, at p. 229.

She did want to facilitate my gain; she acted as a nice neighbor. These are all cases of donations, where a thing of one passes to be of another's because one wills it. [328]

(B) THE OBLIGATION ARISES TO CORRECT THE RIGHT VIOLATION

In rights violations one loses something by an illicit subtraction and another gains the same thing by illicit extension. The obligation emerges as the right that compensates the illicit loss and the duty that undoes the illicit gain. So the trespasser must do what is needed to place the victim back in the situation he would be in had the trespass never occurred, and the enriched has to restitute to the impoverished what she accrued without justification. Doing justice in illicit interactions is, accordingly, correcting the imbalance produced by the illicit interaction.

We think of the obligation as another element of its cause—not as an external effect. We say that the obligation emerges with the other elements of the tort or the unjust enrichment because there is no moment separating the imbalance from the correction. With the wrong that causes damage the obligation to reverse the imbalance emerges. With the unjust enrichment arises the obligation to compensate for the impoverishment. The obligation is in relation with its cause not an effect in the sense of the image of colliding billiard balls. In the private law imaginary the effect is the object, one of the constituent objects of the cause. As the wrong, the causality and the harm manifest themselves in reality, the obligation immediately arises, closing the circle of the juridical transaction.

4.1.3.6.2. A VOLUNTARY OBLIGATION ARISES WHEN THE RIGHT'S ALTERATION IS A RIGHT COMMUTATION

(A) IN A RIGHT COMMUTATION BOTH PARTIES LOSE AND GAIN, AND THE TWO PARTIES WANT THE COMMUTATION, OR ONE WANTS IT AND THE OTHER DOES NOT UN-WANT IT.

The licit interactions are right alterations where two parties commute their legal position in respect of things. What I owned before the interaction is what you own after the interaction and what you owned before the interaction is what I own after the interaction. What if someone replaces something of mine for something of his however? This would be a commutation too. True, but that commutation would not be licit. For someone to

[328] Would a promise of a donation cause an obligation? As we will see in 4.1.3.4.2, a licit cause of obligation requires not only that someone commits to do something at the request of another but also that another reciprocates the voluntary obligation in some form. So, if a gratuitous promise causes an obligation, such obligation is unenforceable. See 5.2.3.2.e.2.

acquire something of mine I must want it in some form.[329] For the commutation to be licit, accordingly, the parties must *want* the commutation. [330]

How can we tell that the parties have wanted the commutation? Private law offers models for establishing those facts. Through these patterns observers can judge that licit commutations are at stake. In performing these patterns private actors assure themselves an effective commutation. The example is contract. The model of the offer and acceptance describes the conditions under which persons effectuate commutations. This model allows persons to implement their desire to effectuate purely executory commutations (an exchange of voluntary obligations), or partially executed commutations (one manual transfer or deed for a voluntary obligation). In contract both parties, offeror and acceptor, want the commutation. We will see voluntary causes of obligations where only one party explicitly wants the commutation; the other… does not un-want it (See 4.1.4.3).

(B) A VOLUNTARY OBLIGATION ARISES WHEN THE RIGHT'S ALTERATION IS A RIGHT COMMUTATION

Voluntary obligations are part of right commutations. Where the commutation is purely executory, the right exchange is of reciprocal obligations. (I obligate myself to do Y at your request so that you obligate yourself to do X at my request). Where the commutation is partially executed, the right exchange is of a voluntary obligation for a value of the same

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[329] I will argue that, if the unilateral substitution implies that I *materially* lose nothing, as when someone gets a chance from me by granting me a performance of her, I need not give my consent.

The promisee of a unilateral promise did not explicitly want the transaction, but neither did he explicitly un-want it; nor it can be said that he did not want it. The law will say that the promisee did not un-wanted the transaction.

[330] Pufendorf offers an explanation for why commutations must be wanted:

> Now it is plain that it was absolutely necessary for Men to enter into mutual Contracts. For though the Duties of Humanity diffuse themselves far and near thro' all the Instances of the Life of Man; yet that alone is not Ground sufficient, whereon to fix all the Obligations which may be necessary to be made reciprocal between one and another. For all Men are not endowed with so much Good Nature as that they will do all good Offices to every Man out of meer Kindness, except they have some certain Expectation of receiving the like again: And very often it happens, that the Services we would have to be done to us by other Men are of that Sort, that we cannot with Modesty desire them. Frequently also, it may not become one of my Fortune, or in my Station, to be beholden to another for such a Thing. So that many times another cannot give, neither are we willing to accept, unless that other receive an Equivalent from us; and it happens not seldom, that my Neighbour knows not how he may be serviceable to my occasions. Therefore, that these mutual good Offices, which are the Product of Sociality, may be more freely and regularly exercised, it was necessary that Men should agree among themselves, concerning what was to be done on this side and on that, which no Man from the Law of Nature alone could have assured himself of. So that it was beforehand to be adjusted what, this Man doing so by his Neighbour, he was to expect in lieu of the same, and which he might lawfully demand. This is done by means of Promises and Contracts.

Samuel von Pufendorf, *The Whole Duty of Man According to the Law of Nature*, Andrew Tooke translation, Liberty Fund, Indianapolis, 2003, chapter IX, n. II (italics omitted).

kind—namely, another subjective right. (You convey me a *ius in rem* over X so that I obligate myself to do Y at your request.)

Since the voluntary obligations are part of the right commutation, in principle, nothing should be said after of the interaction. The rights have been exchanged; justice has been done.

Sometimes jurists talk about the "creation of voluntary obligations."[331] The metaphor is useful in private law only if "creation" is (firstly) taken as specification and (secondly) related to its aim. One creates an obligation in the sense of specification when one determines, of the indeterminate but extant amount of disposable freedom, the performance that one is to obligate. When I decided to commit to do this or that research I created an obligation in the sense that I have posited a new constraint on my future. But the obligated object does not come out of the blue. It was there before in the sense that I could choose to do that thing as opposed to that thing which I could have never chosen, like promising to take you to the moon. On the other hand, an obligation is created in relation to an aim where the cause of the obligation responds to the question "in commutation of what has she decided to obligate her performance?" A response to that question would not be ostensible in transactions whose only available information tells you that the debtor wanted the obligation. We will have time to develop these points further. Let me now proceed to illustrate the logic of commutation through the very useful metaphor of the transfer of a right.

4.1.4. ILLUSTRATION: VOLUNTARY OBLIGATIONS IN THE IMAGE OF TRANSFERS OF RIGHTS

The concept of transfer of right does not belong to the law of obligations.[332] It comes from the law of property, where it works as a mode of acquisition. Jurists developed it based

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[331] "It is said that the contracts have as an object the transmission of a right (Aubry et Rau), but this is no more than an appearance. The transmission of a right is the consequence of the creation of the obligation to give, which is executed once created, and the contracts are not traslative but obligatory." Marcel Planiol, *Traite élémentaire de droit civil, conforme au programme officiel des facultés de droit*, t. 2, Librairie générale de droit & de jurisprudence, Paris, 1921, n° 944, p. 317.

[332] "It is clear that incorporeal property is not susceptible of delivery." These words belong to Gaius (*Institutes*, 2, 28), who sets out the issues emerging from the use of the transfer metaphor in the field of obligations this way: "Obligations, no matter how they may have been contracted, cannot be transferred […] for if anything is due from someone to me, and I wish to transfer the claim to you, I cannot do this in any of the ways by which corporeal property is transferred to a third party; but it will be necessary for you to stipulate with the debtor under my direction, with the result that he will be released by me and becomes liable to you, which is called the novation of an obligation." (*Idem*, 2, 38) And he continues: "Without this novation, you cannot sue in your own name, but you must bring your action in my name, as my agent or attorney." (*Idem*, 2, 39) The *proper* metaphor for the law of obligations seems to be that of contract. (See the discussion in 6.1.3.2.) However, and for the reasons given in the text, we can

on the consideration that "acquisition" alone gives too much attention to the subject who acquires the right and insufficient attention to the subject who gives the right, whose role is essential in very important acquisitional modes, like the manual transfer of a thing.[333] We use the concept of a transfer of right to explicate the logic of voluntary obligations for two reasons. Firstly, it is consonant with the idea that causes of obligation are interactions between two persons. Its invitation[334]—to imagine a right moving from one point to another—implicitly excludes third parties from the focus of attention. And secondly, it serves to build a very eloquent image of commutation. Imagining two rights moving in opposite directions gives a clear idea of justice in voluntary transactions.

4.1.4.1 A TRANSFER OF RIGHT IS A DISPOSITION-ACQUISITION ACT

According to a very useful analysis,[335] there are four requisites for a valid transfer of a right:

(A) 1: OWNERSHIP OVER SOMETHING

(B) 2: AN ACT OF DISPOSITION OF THAT SOMETHING

(C) 3: AN ACT OF ACQUISITION OF THE SAME THING

(D) 4: THE PRINCIPLE OF CONTINUITY, BY WHICH THE ACQUIRER ACQUIRES FROM THE DISPOSER WITHOUT MEDIATION

The last requisite is probably the most enigmatic. If the transfer consisted of two separate acts, one where one party disposes her ownership over a thing and another where the other party acquires ownership over the same thing, we would not be talking about transfer. The acquisition would be a non-transactional, original mode of acquisition. The first party had abandoned the thing (dereliction) and the second party occupied it as an ownerless object (*res nullius*). But if the act of disposition in transfer were something like dereliction then it is possible that anyone, and not only the addressed transferee acquire

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cautiously use the metaphor. Conf. Michele Giorgianni, "Appunti sulle fonti dell'obbligazione," *op. cit.*, p. 70.

[333] Salvatore Pugliatti, "Acquisto del diritto (teoria generale)," in *Enciclopedia del Diritto*, t. I, Giuffrè, Varese, 1958, p. 512.

[334] In a similar sense Bernhard Windscheid: "The expressions born, extinction, modification of the right are figurative expressions, because the law is not something really existing." Windscheid, *Diritto delle pandette*, Carlo Fadda and Paolo Emilio Bensa translation, Torino, UTET, 1902, t. I, §63, note 1.

[335] I follow Peter Benson, "The unity of Contract Law," in Benson, Peter (ed.), *The Theory of Contract Law*, Cambridge University Press, Cambridge and New York, 2001, pp. 128-131.

the abandoned object. Placing the possibility of transfers in the law, we say, paraphrasing Benson, that the person who acquires must acquire *from* the person who disposes. [336]

The paradigmatic example is the manual transfer of a right.[337] Sarah hands her watch to Daniele, who takes it. We assume that Sarah comes to the transaction owning the watch (requirement 1 satisfied). Further, in compliance with requirement 2, Sarah hands the watch over to Daniele with the intention of transferring to him her property over it (in the act of manual transfer, disposition receives the name "alienation") and, in compliance with requirement 3, Daniele receives the thing from Sarah with the intention of taking the thing as his property ("appropriation"). Finally, receiving a thing from the hand of another figuratively complies with requirement 4: There is no instant in which the transferred thing is dispossessed. As a result, what belonged to Sarah before the alienation-appropriation act becomes Daniele's afterwards.

Accordingly, by a transfer of right one party *disposes* of her right and the other party *acquires* the disposed right. Transfers can be also called disposition-acquisition acts in the sense that, in one act, one party disposes and another acquires.

4.1.4.2. TWO MUTUALLY ENTAILED DISPOSITION-ACQUISITION ACTS MAKE UP A COMMUTATION

Two reciprocally caused manual transfers make up what we call "manual contract." A contract is manual when its formation and compliance occurs almost indistinguishably. Sarah picks up a beer from the refrigerator of Daniele's kiosk. While picking up the beer,

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[336] "A transfer of ownership implies that the second party's acquisition is not only with the first party's consent, but also *through* it: The acquisition of one is *from* the other." Peter Benson, *Idem*, p. 129. "[T]he loss (perdita) by the preceding owner (titolare) and the acquisition by the successive are inseparably linked: they are interdependent and contemporary effects and, above all, they are based on the same juridical cause, they constitute two inseparable moments of the same unitary act. The case ["fattispecie"] that constitutes the antecedent must be such that it could produce both effects in their reciprocal relation: It must be, thus, about one and the same cause, by which it is untied the preceding link and tied the subsequent." Salvatore Pugliatti, "Acquisto del diritto…," *op. cit.*, p. 512.

[337] It is probably with the image of the Roman *traditio* that jurists elaborated the concept of transfer. Similarly in the common law: "Much of the law governing transfers of property, for instance, was first conceptualized in terms used to designate the physical transfer of things." Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," in *Yale L.J.*, 23, (1913), pp. 16-59 at p. 24. "Thus, a successful legal transfer required delivery—for instance, "livery of seisin"—the sort of act that might be expected in the physical transfer of a thing. Over time, as the legal concept of property transfers came to be conceptualized in terms appropriate to the physical transfer of things, it became easy for the legal analyst to conflate the legal concept of transfer with the physical acts of transfer. This conflation, in turn, allowed the legal analyst, often unbeknownst to himself, to effectively elaborate the meaning of a legal concept by exploring the physical or mental objects or events with which it is associated." Pierre Schlag, "How to Do Things with Hohfeld," in *Law and Contemporary Problems*, Vol 78, No 185, (March 6, 2015), p. 193, note 25.

Sarah is agreeing to pay the price, which will occur immediately. Here there are two manual transfers. The beer passing from Daniele's ownership to Sarah's and the money from Sarah's ownership to Daniele's. The manual contract is a commutative transfer of right in that two transfers (or acquisition-disposition acts) are reciprocally caused. Daniele alienates ownership over a beer to Sarah because Daniele appropriates ownership over a sum from Sarah and vice-versa. Paraphrasing Paul,[338] Sarah gives so that Daniele gives.

The manual exchange of things is a commutation but not a cause of obligation. There is an exchange of rights but none of the rights exchanged is a credit right or obligation. Here we are dealing with causes of obligation. This means that the commutation must have an obligation as an element.

4.1.4.3 Disposition-acquisition acts that entail voluntary obligations

We are accustomed to think that the only disposition-acquisition act of the law of obligations is the model called "offer and acceptance," that one can dispose and acquire an obligation only by means of an offer-acceptance act. The following section is dedicated to contradicting this instituted belief. It will first explain how commutation occurs in the obligational contract, before then drawing from various positive laws to show that contract is only one mode of commuting rights for obligations.[339] One can dispose and acquire obligations through other acts.

(a) The obligational contract: offer-acceptance act

Marta and David agree that Marta gives $X to David and David will give his house to Marta in a year. In the formation of the contract, there are two reciprocal transfers of rights: Marta transfers property over her money to David and David transfers ownership over his performance to Marta. Yet these transfers differ in nature. The right passing from Marta to David complies with the transfer requirements in the manual contract's way:

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[338] In Justinian, *Digest*, 19, 5, 5 pr.

[339] Showing us that contract is far from the only one type of legal transfer, Puggliatti classifies the various transfers into those that are voluntary, like the contract and the unilateral act, and those that are coercive, like the *ab intestato mortis causa* succession or the adjudication of a right to a third party by the state that expropriates it from another, among other examples. "Acquisto del diritto…," *op. cit.*, p. 511. In "the coercive transfers" the attribution of the right to the new owner is made independently of the will of the preceding owner (and so also *against* his will). But the attribution is done with acknowledgement of the preceding subjective situation. Thus, when compensation is due, as in the case of the expropriation, the compensation is based on a consideration of the interest of the expropriated party—not on his will. Puggliatti notes that these transfers are however of an exceptional character. *Idem*, p. 512.

The money passed from Marta's to David's hands; Marta *alienated* her ownership over the money and David *appropriated* it. The transfer of right going from David to Marta is different however. It is not so clear how it is that the house, which was not yet delivered, passed to form part of the buyer's assets (or "patrimony").

How can the law assert that something went from one patrimony to another if the only perceivable thing is a voice passing from the mouth of one to the ear of another? We need to be very clear about what Marta acquires from David and how, for injustice will occur if we are not convincing—only David would have made an acquisition.

The law has regulated this social demand with two sophisticated concepts, that of "voluntary obligation" and that of "intelligible transfer." Let us begin with the concept of voluntary obligation. By the obligation, one party (the creditor) has a right over a performance and another party (the debtor) has the correlative duty to perform. The strictly legal concept of performance is crucial to the understanding of the obligation. A performance is nothing but the image of a choice that is possible in the juridical world. "I will give you my house on December 1st" is something that you (even if you have never seen my face) can somehow imagine. This image is a choice because the image of "I give you my house on December 1st" is something that involves an agency of mine. And the performance is a juridically possible choice because, assumedly, the house is mine and I have the capacity to give it to you. Classical examples of juridically impossible performances are the following images: "I will give Michel's watch to you." This performance is legally impossible because, even if you could imagine me giving you someone else's watch, I cannot have the power to give you something that is not mine. Another example: Monk August, a person who has renounced his capacity to own property by vow of poverty, promises to sell the monastery he lives in to Jenifer. This performance is legally impossible because, even if he is using and enjoying the fruits of "his" monastery, he has no capacity to sell it, for he is not an owner of things. The performance will also be juridically impossible—note carefully what I am saying—if the performance is factually impossible. For example, "I am transferring my watch to you" or "I transferred you my watch." Unless we have a means to travel into the past, it is impossible for me to obligate myself to do something in the past; nor can it have any legal significance that I obligate myself to do the thing that, by the time I am obligating myself, has been already done. Unreasonable performances are juridically impossible too. You cannot treat my promise to take you to the moon as an enforceable promise, unless, of course, I act in representation of NASA. Nor, by the same token, can you take my promise

to pay you high interests if I am an overwrought debtor looking for loans to cover debts. You know, or should have known, that I will not be able to perform.[340]

Let us go back to the case of Marta and David. This was an obligational contract. The obligation related there comprised the performance that David gives his house to Sarah on December 1st. Yet this did not only stand on David's obligation. Remember, David was obligated to deliver his house on December 1st because Marta transferred him the price agreed when the contract was made. I add this information to lead us to the point: It is because the law found justice in the practice of exchanging present things (the price of the house) for future things (the expectation that David will deliver his house on December 1st) that the law constructed the concept of obligation. In other words, the obligation is an object of exchange because of the thing it is an exchange of. This is why civilians used to say "every obligation has a cause" and tenacious common lawyers still disdain the pact without consideration as "*nudo.*" We see that voluntary obligation is a value of exchange. Its content consists in a deed within the realm of choice of the debtor and it has exchange value because it is exchangeable for rights.[341]

Now we come to the notion of intelligible transfer. The performance is the thing that David is transferring to Marta. He owns this thing because it is part of his freedom (see above 4.1.3.2(a)). By obligating a performance of his, he is, as it were, parceling part of his freedom and giving it to Marta. How is it that this transfer took place? It took place through the offering of the performance to Marta and Marta's acceptance of it. We qualify this transfer as "intelligible" because, in contrast with physical transfers, the thing transferred passes from one to another in an imaginary way. Contract is the intelligible transfer where one disposes with the act called offer and the other acquires with the act called acceptance. To briefly develop on this I first have to introduce the concept of "intelligible possession."

If the concept of obligation was drawn over the image of corporeal things,[342] the concept of "intelligible possession" appeared to replace the concept of "empirical possession."

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[340] The consequence is the absolute nullity of the contract for lack of cause. For another solution, see Hans Kelsen, *El contrato y el Tratado: Analizados desde el punto de vista de la teoría pura del derecho*, García Máynez translation, Nacional, Mexico, 1979, p. 63, to whom it is a question of positive law. If the positive law does not establish a rule saying: "No one is obligated to the impossible," the rules applicable to the case of nonperformance of an impossible obligation are the general rules on nonperformance of obligations, which will (most likely!) demand the debtor to repair the damage caused to the creditor by the nonperformance of the obligation.

[341] We will come back to these ideas in 5.2.2.1.

[342] Tellingly, a Roman law classification of things holds that one type of things are the corporeal things, "such as land, slaves, clothing, gold, silver," which one can touch, and other type of things are the incorporeal

Possession is empirical when someone is holding something with the intention of excluding others from holding the same thing. Someone with an apple in her hand is someone with a tenancy of an apple, but someone who is eating an apple is someone with empirical possession over it; there is no better sign of one's intention to exclude others from holding a thing than the thing's consumption… Now, could someone possess something without physically holding it? Do we have to hold everything we want to possess? Jurists find these questions very important, for any reasonable property regime would make it possible that owners could exclude others from the use of their things without physically excluding them. In response, jurists ideated the very useful concept of intelligible possession. Through it, a person is connected to a thing in a way that unauthorized contact with the thing counts as a wrong to the person. And a person acquires that connection whenever she rightfully acquires a thing.[343]

What contract ensures is that one party acquires the performance, takes, as it were, its intelligible possession by accepting it. Marta took possession of David's performance at the time and place of contract formation, even if the performance is not something that she could grab empirically and its object (the house) is in another place and time (it will be finished in December 1st, far from the place of contract formation). Marta's acceptance of David's offer gave her intelligible possession of David's performance, which implies Marta's ownership over the David's obligated performance—David would wrong Marta if for example he does not build the house.

David's disposition cannot be called alienation—he did not manually transfer his house to Marta. He disposed by an (accepted) offer of an obligation (reciprocated). So we see that "offer" is an act of disposition in that it implies the intention to dispose (or obligate) a performance of one to another who, accepting it, acquires it.[344] The "acceptance" of the

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things, among which is included the obligation. See Justinian, *Institutes*, 2,2,1-2; also in Gaius, *Institutes*, 2, 14.

[343] The question "Why is it that we have ius in rem in law?" ultimately becomes "Why is it that we are entitled to acquire property?" Giving juridical form to the social demand of "How to have something external as one's own": Immanuel Kant, *The Metaphysics of Morals*, Mary J. Gregor translation, Cambridge University Press, Cambridge, 1996, 6:245-6:257.

[344] To be more precise, "offer" is the specification of the requirements of both "disposition" and "acquisition." In the offer, the offeror manifests her intention to transfer a performance of her own to the offeree and, at the same time, accepts in advance the transfer implicated in the acceptance of the offer. And "acceptance" is the specification of the requirements of both "acquisition" and "disposition." In the acceptance, the acceptor manifests her intention to acquire the performance transferred through the offer and manifests her intention to obligate the performance requested in the offer. The concept of the "meeting of the minds" (or offer and acceptance) is the contractual specification of the "continuity requirement," see the explanation in Peter Benson, "The unity of Contract Law," *op. cit.*, pp. 138-153 (thought it is difficult to send someone to read only a fragment of so well a systematized whole).

offer is, in the obligational contract, the act of acquisition of a performance. And, as the parties are not physically giving and taking, the transfer is not empirical but intelligible.

The obligational contract is the paradigm of a voluntary cause of obligation (or commutation that includes an obligation). However contract is not the only one voluntary cause of obligations. There are modes of commutation that include obligations and are not contractual.

(B) THE PROMISE *SOLVENDI CAUSA*: PROMISE-RECEPTION ACT

Daniele, who is an adult salesman, convinces Sarah, who is apparently a minor, to sign a contract by which she obligates herself to pay him $50 (the following month) in exchange for the doll he conveys her in the same act. Before the date of payment Sarah breaks the doll while playing with it. Daniele sues Sarah for the payment of the $50 and Sarah's mother alleges that the contract is void, for Sarah is incapable of assuming obligations and Daniele could discern this. Judgment is held in favor of the defendant. Ten years later, Sarah plans to purge the recurrent angst, finds Daniele's email and writes to him saying that she will pay him the $50 she owes to him since that episode of her childhood. For a while, Daniele does not reply the email and Sarah, in a reckless rash, writes to Daniele again, asking him to forget about the previous email, that it was a stupid psychological issue of her own. Daniele replies immediately, telling Sarah that she must not over-think, that he is actually interested in the payment, adding also the number of his bank account. Fed up, Sarah replies saying that he should have done that immediately after that she wrote to him and that she is no longer interested in paying him the money. Now Daniele sues Sarah. He argues that Sarah promised him the payment of an unenforceable debt and that, although Sarah attempted to revoke the promise before he did something to "accept" it, these promises do not need acceptance. Sarah alleges that the offer was revoked before the acceptance but, this time, the judgment is for Daniele.

This story takes the case of a Roman law action to order it in accordance with the Italian law of recognition of debts.[345] Promises made to recognize unenforceable debts obligate

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[345] See F. C. von Savigny, *Le Obbligazioni*, t. 1, Giovanni Pacchionni translation, 1912, UTET, Torino, §9 and ss. (discussing Roman law cases of natural obligations) and section 1988 of 1942 Italian Civil Code, which says: "Recognition of debts: The promise of payment or recognition of a debt dispenses the person to whom is made of the burden of proving the bases of the [recognized] relation. The existence of it is presumed unless contrary proof."

Promises recognizing debts seem to be enforceable in the common law too:

> A subsequent promise to pay a debt barred by the statute of limitations, or to pay a debt discharged in bankruptcy, or to pay a debt that is uncollectable because the debtor was a minor at the time the debt was contracted, is legally enforceable even though there is no fresh consideration for the promise.

from the moment of their communication and are therefore irrevocable. The promise obligates because, by the time it reached the promisee, the promise, so to speak, matched a consideration. The commutation in the promise's *solvendi causa* is about an obligation for (permit me the inappropriate usage) a past-consideration.[346] I will briefly analyze promise as a disposition-acquisition act.

In promise, a credit right moves from the promisor to the promisee. What are the constituents of this transfer? They cannot be offer and acceptance. If we think of Sarah's disposition as an offer then we will not be able to assert the transfer, for Sara revoked the offer before Danielle could be said to have accepted it. The act by which Sarah disposed is the legal act of "promise." But if promise is the act of disposition, what is the act of acquisition? I call the acquisition act "reception of a promise." Both promise and reception operate on the basis of intelligible acquisition and disposition. In making a promise, Sarah intelligibly transfers an obligated performance to Danielle, who acquires it by receiving (or gaining knowledge of) the promise. Danielle would have not received the promise and therefore acquired the credit right if Sarah managed to let Danielle know of her intention to withdraw—not revoke—the promise before its reception. As can be seen, the continuity between disposition and acquisition through promise is in one sense more immediate than it is in offer and acceptance. All these points will be developed with due care in 5.2-3.

Richard Posner, "Gratuitous Promises in Economics and Law," in *Journal of Legal Studies*, Vol 6, (1977), pp. 411-426 at 418.

[346] Let me be more precise. There are two transfers of rights here. On the one hand, there is an *in personam* right going from Sarah to Daniele, and on the other hand, there is an *in rem* right going from Daniele to Sarah. And these two transfers of rights are reciprocally caused. Let me briefly develop.

In its proto-existence, the *in rem* right transfer was about a capable person giving a thing (not a right over a thing) to a child. This act alone, to the law, had a peculiar significance. Daniele interacted with a child as if the child were a capable person. Since Daniele knew or should have known that minors are not responsible in private law, everything that followed from his interaction with the child was at his own peril. He could have asked for recovery of the thing. But the thing perished in the minor's hands. And as the thing's disposition brought no produce, no value remained for him to demand. In addition, the parents were not responsible for the minor's deeds. They did not ratify the contract, recognizing Daniele's right to the payment of the toy. There was nothing that Daniele could do. To the law, he has lost his right over the transferred thing. Still, Sarah grew up and wanted to recognize the reason that would allow her to dispose of Daniele's thing as her thing. The promise *solvendi causa* had a double effect: It recognized the unpaid acquisition of an *in rem* right and it transferred a right *in personam* to pay for the acquisition. In other words, the transfer of a thing became a transfer of a right due to the effectivity of the *in personam* right transfer. And the opposite is also true. The transfer of a performance became a transfer of an enforceable right due to the effectivity of the *in rem* right transfer. We see that promise *solvendi causa* is about two reciprocally caused transfers of rights. So, by the promise *solvedi causa*, the promisee acquires a right to the payment of an unenforceable credit and the promisor becomes obligated to pay an unenforceable debt to the extent of the recognition.

(c) The retributory bequest: bequest-ideal reception act

Silvia writes a letter with the following words: "Hereby I manifest my deliberate and firm last will that, in recognition of the time and efforts that Alberto spent taking care of me during these last years, my Fiat car must pass to belong to him after my death." The bequest or *legatum*[347] may appear as a clause of a testament or as a separate act and, regardless of the solemnities that a jurisdiction may require for its validity, it is essentially an undertaking. The bequest is an undertaking in that its author (the legator) decides that something of hers must be regarded as something of another person—the legatee. The difference between the bequest and other unilateral undertakings like promise is that the bequest is a conditional undertaking. The bequest is conditioned in that it achieves its practical significance—it transfers a right to the legatee—only after of the occurrence of an event—the testator's death.[348] It follows from this that the legatee acquires the right immediately after the legator dies. It is important to emphasize that the legatee acquires the right granted by the bequest regardless of the fact that he (not only accepts the bequest but also) has knowledge of the bequest. For the legatee to acquire the right over the legated thing it suffices that the testator dies.

The justice of our example is self-evident: Alberto performed some good agencies for Silvia and Silvia wanted to compensate these deeds. But to give Alberto the tools to argue acquisition of a right we need to specify the requirements of transfer in bequest. How are we to convince the audience of the presence of these requirements?

The mode of disposition is the "bequest." Like the promisor, the testator intends to dispose a credit right in favor of a second party. Bequest is different to promise however. If the promisor addresses the promisee with a promise, the testator does not address the legatee with a bequest. She just makes the bequest. What about the mode of acquisition? Like promisees, legatees acquire without acceptance. However, unlike promisees, legatees acquire in ignorance of the disposition-act. Promisees do not accept promises but at least know that they acquire them, receive the promises of which they are the

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[347] For legate in general see Pasquale Voci, "Legato (dir. rom)," in *Enciclopedia del Diritto*, t. XXIII, Giuffrè, 1973, Varese, p. 707-719.

[348] I must emphasize that this condition conditions the bequest and not the obligation (or practical significance) of the bequest. If the obligation were conditional in such a manner, Silvia would have no power to change her will, for the bequest left an obligation by which Alberto has a (conditional) right to the Fiat. But this construction is not amenable to the social practice of making dispositions of last will—individuals want to have disposability over their things until their last breath. Jurists sought to satisfy such societal exigency by construing the bequest as a conditional act. The condition conditions the bequest. In this legal form, the bequestor holds the ability to revoke the bequest until she dies (she may change it, e. g. designating another successor for her car, or simply revoke it) and the bequest becomes valid immediately after she dies.

addressees. With the reception of the promise, I said, there is intelligible possession of the promised performance. Here we cannot say that there is intelligible acquisition of the bequest; at least, not in the form of "reception." So, given all these differences, what is the act of acquisition in legate? How is it that legatees acquire credit rights without even noticing? The mode of acquisition at stake here is what, inspired by Kant's insights, I call "ideal reception." I want to suggest that the legatee acquires a credit right without even knowing due to a systematic necessitation. What do I mean by this? I want to say that the alternatives surrounding my proposal are so powerfully unjust that my proposal emerges spontaneously as the right one.

A person makes a disposition of last will according to which after she dies a certain person must have a right to a specific thing of hers. The condition of the bequest happens to occur and, if the will of one who is no longer with us is to be respected, the legatee must have a right to the thing. The legatee cannot be said to acquire the thing from the testator by means of reception of the legate. It would be too much to require that the legatee stood next to the deathbed to hear the legate immediately after the deceased passed. What is more, it is generally the case that legatees are the last to know of their condition. Hence the question arises of what should occur? Should the thing pass to the default heirs? This seems to be contrary to the testator's will. Should the thing become *res nullius*? This also seems to be contrary to the testator's will. The thing should pass, ex justice, to the legatee. The legatee must have the right to acquire property over the legated thing. This is not a right to accept the bequest but straightforwardly a right to the legated object. How does the legatee acquire the credit right? Kant refers to this mode of acquisition as "ideal acquisition of an external object of choice." [349] He calls it "ideal" because "it involves no causality in time and is therefore based on a mere idea of pure reason."[350] In other words, since it involves no deed by the legatee, the acquisition cannot be conditioned on an observable event, as if the legatee had to accept the bequest immediately after the testator's dead. "It is nonetheless true, not imaginary acquisition,"[351] in the sense that "every human would necessarily accept such a right (since he can always gain but never lose by it)."[352] If in knowing of his right to acquire a real right over the thing, the legatee thinks that he does not want it, (e.g.) because wanting it would cause him unpleasantness with others, he can reject it.[353] "[T]he only reason I do not call it real [Kant continues] is

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[349] See Immanuel Kant, *The Metaphysics of Morals*, *op. cit.*, at 6:291.

[350] *Idem*, 6:291.

[351] *Idem*, 6:291.

[352] *Idem*, 6:294.

[353] *Idem*, 6:366. I will extend this argument in 6.1.4.2.

that the act of acquiring is not empirical, since the subject acquires from another who…has *ceased to exist."*[354]

4.1.5. The importance of cause of obligation: A high-legal concept

4.1.5.1 Law cases, legal concepts and high-private-law concepts

In a systematic organization of a just law of obligations we distinguish three levels of law: legal case, legal concept and cause of obligation.[355]

Alberto says to Machteld that he will give her his watch if she pays him €250. Machteld says, "Yes!" This is a very easy *legal case*. You can judge from the perspective of a particular legal concept that the facts at stake qualify as a legal concept—the concept called "contract."

The meeting of an offer of an obligation for a consideration with an acceptance forms the *legal concept* called "contract." The contract is so articulated that we can apply it to innumerable possible cases. The case described above is a typical one. We call it "sale."[356] But there are atypical contracts too. I offer to paint your wall if you commit to take my child to school for a month and you accept. This is an atypical contract. It cannot, for example, be called "barter," for even if we have exchanged non-monetary things, the things we exchanged are not tangible things but performances. This contract is atypical in that it has no name—you cannot mention it with a proper name that a jurist would recognize. Yet you can explain it as a contract.[357] You can tell that there is an offeror and an acceptor and that the offeror contracts an obligation as against the acceptor that is reciprocated by a correlative obligation of the acceptor as against the offeror. In other words, you can explain the case from the perspective of the abstractions of offer,

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[354] *Idem*, 6:291.

[355] See "legal trialism" in Introductory Part.

[356] Or, to be more eloquent, "contract of buy and sale."

[357] Classical Roman jurists could have never seen a contract in a case like this. They had a different way of regulating contracts. They organized contracts in a *numerus clausus* list. The enforceable contracts where the specific legal cases enumerated in the list. As the above-mentioned case was not enumerated in the list—it was an innominate contract—the case was not a contract, or there was no right of action for such case in the list. As Alvaro D'Ors, *Derecho privado romano*, 2ª ed., Ediciones Universidad de Navarra, Pamplona, 1973, §125, p. 364-365 puts it, "the correlation between the obligation and the action is such that where the in personam action is missing it is also missing the obligation". Originally in Fritz Schulz, *Classical Roman Law*, Clarendon Press, Oxford, 1951, n° 13, p. 11: "To a considerable extent classical law might be called 'actional law' or 'law of actions', since it appears in the shape of statements about judicial remedies.". For a less radical but yet consonant and very informative account: Max Kaser, *Derecho romano privado*, 5th ed., José Santa Cruz Teijeiro translation, Reus, Madrid, 1968, §33, n. 1.

obligation, acceptance, and consideration, convincing a reasonable listener that a contract is at stake, that two persons indeed assumed reciprocal obligations.[358]

The legal concept called "contract" is a genus of various kinds (or better: types). But contract is itself a kind of a more fundamental concept. Together with the legal concepts of "tort" and "unjust enrichment," the contract is a kind of "cause of obligation." Cause of obligation is a *high legal concept* in that it represents already abstract laws. No contractual debtor would demand the breach of an adequately caused obligation, having the more specific and familiar concept of contract on which to rely, in the same way that no vendor would demand the breach of a contract due to having the more specified concept of sale. Yet, cause of obligation has a practical function. In the previous section I sought to explicate the concept of "cause of obligation," to systematically expose it with a series of conditions. I now want to discuss the legal significance of this concept. What is the practical significance of the high-concept of cause of obligation?

4.1.5.2 Our high-concepts serve to criticize legal decisions, explain the law of obligations…

Scholars who classify obligations in accordance with their causes often justify their classifications on their expositive or pedagogical function.[359] The classification offers a

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[358] There must be a practical significance in the distinction between typical and atypical contracts. The practical significance, I will suggest, is this: Whereas the atypical contract requires proof of its legal character, the typical contract does not require such proof. To say that there was a contract it suffices that the lawyer proves there was agreement about the exchange of money for a movable or immovable thing to say that there was a contract. The lawyer's task consists in showing the elements of the sale's contract as instantiated in her case. That being argued, the easiest strategy for the defendant is to claim that this was not the case; that the plaintiff failed to adduce an account of the facts of the case in terms of a sale contract. It would be a titanic legal enterprise for the defendant to prove that the contract of sale is not a contract, or that the contract of sale, being a contract, is an unjust cause of obligation. Now, the lawyer who wants to prove that her case is an atypical contract must elaborate two orders of proof. First of all, she must prove that the type into which her case hypothetically falls is a contract. It must, following the example of the text, prove that "I agreeing with you that I will do something in exchange of a commitment of yours" is a contract. The lawyer will elaborate that proof with the systematic components of the contract. Having proven that the hypothesis at hand is a contract, or that she has a legal argument, the lawyer must now proceed to prove that, as a mater of fact, the parties made this atypical contract. That one said "Sure!" to the other's question "Hey, what if I paint your wall and you take my child to school for the month?"

[359] Luís Díez-Picazo explains that there are two questions involved in the traditional discussion concerning the "sources of the obligations." The "fundamental or key question" for the scholar, maintains Díez-Picazo, "[c]onsists in determining what juridical fact or facts are necessary so as to consider as born and contracted, with its sequel of rights and duties, an obligatory relationship." "The second issue possesses a didactic or scholastic character. Once that the sources have been enumerated the question is about establishing a classification or a systematic ordination of the sources of the obligations, gathering them by the similitude of their characteristics or by the similitude of the reasons that serve as their foundations." *Fundamentos del derecho civil patrimonial*, t. II, 6ª ed., Civitas, Madrid, 2008, p. 157.

friendly way of learning the facts that give place to obligations in private law. I agree with this statement—the classification instructs the reader as to the law's content. Yet, one must elaborate further.

As I said before, essaying a serious classification of the obligations requires an idea of what the classified items are. What are we going to include in our classification? This idea, in my view, is the high-concept of cause-of-obligation. We owe our taxonimisation of the phenomena we take for contracts, torts and unjust enrichments to its existence. Now, if we conceive of this high-concept as transactional justice, as justice in the interactions that affect the rights of the interacting parties, then we have a structural idea of what the law of obligations is. The pedagogical function of the classification turns out to be different, or more educative. By reading or elaborating a classification of the obligations we not only get to know the content of a law of obligations but also its form. We know that the law of obligations has to do with interactions between two persons, that what is relevant is that the interaction affects the persons' rights, that there seem to be only two modes in which persons affect their respective rights in transactions and that one mode of private law justice corresponds to the licit character of a right alteration and another mode of the same justice corresponds to the illicit character of a right alteration. This is a better or more extensive and reliable knowledge of the law of obligations.

The point of knowing the law of obligations in such depth is manifestly worthwhile in and of itself. But you can utilize this knowledge too. Knowing the form of the law of obligations empowers you to criticize legal cases or ever-fluctuating arrangements of the law of obligations.[360]

Suppose a legislator dictates the following norm: "The person who performs the activity requested in a promise of a reward is entitled to the reward even if he ignored the promise." A legalist could say that this is a cause of obligation. There is a situational case (someone happens to perform the activity requested in a promise of a reward), and a legal effect (this someone is entitled to request the promised performance to the promisor). A legalist will proceed to enumerate this new case in one of the categories that she or he

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[360] In Weinrib, classification is the process through which one must understand and criticize the law:

> Juridical classification should therefore be seen not as a taxonomy of what the law's categories are but as a working out of what they must be if they are to live up to the common law's own aspirations as a juridical phenomenon. Juridical classification allows both a sympathetic and a critical attitude toward existing legal categories. Sympathy arises from the possibility of understanding the common law's categories in the light of its juridical aspirations. Criticism arises form the recognition that a given category may infelicitously fulfill those aspirations.

Ernest Weinrib, "The Juridical Classification of The Obligations," in Birks, Peter (ed.), *The Classification of the Obligations*, Oxford University Press, New York, 1997, pp. 37-55, at p. 38.

thinks fit or, in the absence of one, develop it. The reasoning is the following: there is a law establishing X fact as an event that causes obligations; I am a legal commentator; therefore, I must classify X as a cause of obligation. The jurist would approach the new law differently. This law wants to grant a credit right to someone who returns lost property, ignoring that the owner promised a reward. The cause of such right could never be a voluntary obligation-interaction. The plaintiff related to the defendant as someone who wants to return someone else's property—not as someone who expects a reward. In doing so he lost the possibility of addressing the defendant as his creditor, the manner of address he would invoke if, before returning the lost thing he received from her a promise of a reward and got a right to credere. I am a jurist, someone who talks about the justice or injustice of laws; I should be critical towards this law, for it fails to adequately establish a voluntary cause of obligations.[361]

4.1.5.3. …AND (*I SUBMIT*) RECOGNIZE NEW CAUSES OF OBLIGATIO

There is a third, somewhat unsung[362] function of cause of obligation. Knowing the concept of cause of obligation permits us to identify new causes of obligations and to explain them us such.

The concept of the right of bodily integrity is closely connected to the concept of battery. The former is an interaction that alters the rights of persons and the latter is what such specific cause of obligation presupposes. Both concepts make up the tort of battery, with which a lawyer can articulate a corrective justice claim. We can see and explain this tort in reality because we have knowledge of the notions of right and obligation, which make that reality a tort. We can say that the driver must compensate the harm caused to the pedestrian because we can think of their relationship as a violation of the right of one through the wrong of the other. We wouldn't be able to make that judgment without the notions of the right of bodily integrity, illicit, damage, actual contact, and malice. These

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[361] See more in 2.4.3.1.

[362] Though there are notable exceptions. Mayer-Maly complains of the uncritical attitude with which his contemporaries classify the obligations established by special statutes and maintains that: "…in our discussion of the system of the obligations we may learn quite important things. On the one hand we cannot avoid the continued recognition of other causes of obligation besides contract and delict. On the other hand there exists the need for a satisfactory legitimation of obligation which does not involve our eschewing a consequent *divisio obligationum*." Theo Mayer-Maly, "Divisio Obligationum," in *The Irish Jurist*, Dublin, (1966\1967), pp. 375-385, at p. 384.

More generally: "Oltre tutte le formule, quasi sempre imperfette, e quindi, per sè sole, fallaci, vi è la ragione animatrice dell'intero organizmo logico; e a questa ragione il giurista deve sopra tutto avere riguardo, per ben comprendere e rettamente applicare, *anche a casi nuovi*, il diritto vigente." Giorgio Del Vecchio, "La Crisi della Scienza del Diritto," in *Studi sul Diritto*, vol. I, Giuffrè, Milano, 1958, at p. 178, (italics are mine.)

concepts determine *our* reality as well as restrict it. The torts we see in streets are the torts we know of. These legal torts limit our vision of illicit reality.

It could very well be that a cause of obligation other than a tort, contract and unjust enrichment exists, occurring in reality. Hence, the concept of cause of obligation has a role to play. It provides us with a viewpoint that is structurally identical to the existing causes of the obligations but that has been substantively emptied, cleansed of content. We are no longer limited to bodily integrity, contractual performance, *in rem* rights; we are no longer constrained into seeing offer and acceptance, wrong and harm, enrichment and impoverishment. Our perception is henceforth amplified. With terms like subjective right and legal interaction we can aim to identify exigencies and practices that, being unfamiliar to the law in existence are nonetheless explainable in legal terms. But legal concepts, however high, have clear limits. We must deal in interactions between persons, namely, separate free independent wills (4.1.3.1). These persons must come to the interaction with a subjective right, namely, a power over a thing of one as against the other that, as justice grounds them, one has it because the other has it (or could have it) too and none of them could dislike the fact that the other has it (4.1.3.2). Finally, the conduct of one must be relatable to the conduct of another (4.1.3.3.1), and such interaction must affect the party's rights (4.1.3.3.2). Only then can we begin to specify the rights with which the parties come, the interaction that affects those rights and the kind of obligation that justice would demand. Evidently, the concepts, however high, limit our perception. We cannot make up causes of obligation whenever we are called to do so.

On the whole, mine is a sensible point. Identifying new causes of obligation requires new legal concepts. This means that we have to make new law. This enterprise has long been regarded as undoable in private law. Most scholarship on the classification of obligations has discussed the point.[363] The question is whether private law can recognize new causes of obligation. The next section is dedicated to responding to this question affirmatively.

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[363] One Spanish commentator famously said:

> May be the problem of the sources of the obligations responds to an obsession of the doctrine. In the practice, art. 1.089, which enumerates them, has almost only served in Spain as the basis to discuss whether the unilateral will can be a cause of obligations. We will deal separately with this question.

José Puig Brutau, *Fundamentos de Derecho Civil*, t. I, 2 ed., vol. II, Derecho General de las Obligaciones, Bosch, Barcelona, 1976, p. 37. Almost every early twentieth century Italian author who dealt with the question of the causes of obligation dealt also with the question of the unilateral promises. For example, Emilio Albertario, who wrote "Le fonti delle obbligazioni e la genesi dell'art. 1097 Codice Civile," in *Rivista diritto Commerciale*, (1923), I, p. 493 and ss., occupied himself with the issue of promises in "La pollicitatio," in *Publigazioni della Università Cattolica del Sacro Cuore, Serie Seconda: Scienze Giuridiche*, Vol XX, Milano, (1929) (elaborating various reasons for not bringing promises to private law). Antonio Scialoja writes "Le fonti delle obbligazioni," in *Rivista di Diritto Commerciale*, Vol. II, (1904), pp. 520-530 and "La dichiarazione unilaterale di volontà come fonte di obbligazione," in the same journal (*Rivista di*

4.2. CAN WE CONSTRUE NEW CAUSES OF OBLIGATION? (A QUESTION AMONG FORMALISTS)

4.2.1. "NO WE CAN'T", THE *NUMERUS CLAUSUS* ARGUMENT

Previous generations of jurists believed that the norms classifying the obligations in accordance with their causes could enumerate all possible causes of obligation. If Art. 1097 of (1865) the Italian Civil Code says, "Obligations arise from the law, contract or quasi-contract, delict and quasi-delict," it is because the obligations arise only from the facts fitting the enumerated causes. The cases for which the statute provides no obligation are outside of the law of obligations. This *numerus clausus* interpretation was possible only due to a series of assumptions about private law, which I will now explicate.

4.2.1.1. THE CLASSIFICATION HAS EXHAUSTED ALL THE POSSIBLE CAUSES OF OBLIGATION

By means of introspective reflection and through a methodical process of doubtful questioning, the modern genius could discover the *a priori* principle of law, a proposition that was so evident that to doubt it would entail a contradiction. Modernity could thus work downwards towards conclusions about law, deriving legal concepts through logical deduction, as one would proceed in geometrics.[364] "Every legal concept has its own distinct and bounded place, and every place is occupied by a distinct and bounded legal concept."[365] And since the modern genius could foresee, describe and classify (in one

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Diritto Commerciale, Vol. I, (1904), p. 370 and ss, forcefully arguing that promise cannot create obligations but rather justifying the obligations of almost every relevant promissory case on the basis of acceptances implied by law.) Finally, Nicola Stolfi, a scholar writing some years before the 1942 Italian Civil Code, deals with the issue of the promesse unilaterale immediately after of the classification of the obligations, a section which he closes saying:

> In any case, the controversy on the sources of the obligations is important from the scientific viewpoint; namely, the attempt to give a better systematization to the matter, or because it serves to clarify the diverse importance among the various causes of the obligations. And to be convinced about this it suffices to revisit some grave disputes, which are waving in the modern doctrine, and this is on the unilateral promise

Diritto Civile, v. III: Le Obbligazioni in Generale, Torino, UTET, 1932, Capitolo III, n. 237, p. 116. Prominent French authors who included the unilateral promise as another cause of obligation—distinct to the contract and without legislative bases—are René Demogue, *Traitè des obligations en général, tome 1: Sources des Obligations*, Rousseau, Paris, 1923, p. 44 and ss (who divides the obligations into five: the contract, the unilateral will of the debtor, the illicit act, the will of the creditor (quasi-contracts) and the simple fact (better known as legal obligations)) and Louis Josserand, *Cours de Droit civil français*, t. II, Sirey, Paris, 1930, num. 11, p. 6 (who divides the obligations in three: Firstly, the juridical acts, which are subdivided in contracts and unilateral undertakings, secondly, the illicit acts, which include the delicts and quasi-delicts, and finally, the enrichment without a cause.)

[364] See James Gordley, "The State's Private Law and Legal Academia," in Jansen, Nils and Ralf Michaels (eds.), *Beyond the State: Rethinking Private Law*, Mohr Siebeck, Tubingen, 2008, p. 646 and ss.

[365] The "grid aesthetic" is in place. "In the grid aesthetic, law is framed as a field, a territory, a two-dimensional space that can be mapped and charted. This jurisprudential mapping occurs through the

word: exhaust) all the practical implications of the principle, nothing would remain outstanding;[366] hence the Prussian Civil Code of 1794, with its aspiration to complete casuistry and approximately 20.000 paragraphs… In Savigny's critical appraisal, an attempt to "contain in advance a decision for every possible case."[367]

The last generation of formalists thought that their written law, the civil code or the mature common law arrangements were complete. Completeness meant the norms so laid-down were the unique sources of law, that the only relevant cases for the law were those cases for which the law provided a specific solution or that the lawyer who wanted to back a claim with an argument had no other basis on which to appeal than to show that the claim was written in a legal text. Completeness therefore implied the irrelevance of considerations of principle. "The law imparted in a thorough and thoroughly learned legal education was sufficient to answer legal questions, and sufficiently good to answer them in a way that guaranteed just results. Thus, the lightness of justice, from a formalist perspective. There was no "internal" reason to teach or study the meaning of justice: law was complete and autonomous."[368]

What then could our predecessors say about a norm classifying obligations? The significance of such norm is to clearly state that only the enlisted categories can ground obligations, that an obligation claim that fails to dress its case in one of the enlisted categories must be rejected without consideration, as illegitimate or without grounds.[369]

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subdivision of the territorial space of law into various parts: contracts/torts. Each part is subdivided into subparts: negligence/intentional torts. These are then subdivided into even smaller subparts. This process continues until a mysterious point is reached where law gives out and all that remains are questions of fact." Pierre Schlag, "The Aesthetics of American Law," in *Harv. L. Rev.*, 115, (2002), pp. 1047-1118, p. 1055.

[366] Gordley, "The State's Private Law…," *ob. cit.*, 647. See also Wikipedia's entry "legal formalism":

> The "formalist fiction" is that the process that produced the legal norms has exhausted normative and policy considerations; accordingly, law can be seen as a more or less "closed" normative system.

http://en.wikipedia.org/wiki/Legal_formalism (March 12, 2015).

[367] Quoted in Joachim Rückert, "Friedrich Carl von Savigny, the Legal Method, and the Modernity of Law," in *Juridica International*, XI/2006, p. 63.

[368] Robin L. West, *Teaching Law, Justice, Politics and the demands of Professionalism*, Cambridge University Press, New York, 2014, p. 79.

[369] Spanish private law instantiates this reasoning in *Sentencia del Tribunal Supremo de 25 de abril de 1924*, which, in its third consideration, says:

> the obligations cannot have another cause or origin from which they born or to which they owe their existence than those determined by the legislator; this is to say: the law, the contracts, the quasi contracts and the illicit acts or omissions or those in which there is any kind of fault or negligence, according with the disposition of article 1.809 (sic) of the Civil Code.

Conf. the Sentencia del Tribunal Supremo de 25 de abril de 1928. This view was revised by Sentencia de 1 del Tribunal Supremo de diciembre de 1955, de 13 de noviembre de 1962 and de 30 de septiembre de

4.2.1.2. PRIVATE LAW IS INDEFEASIBLE

Private law is not only gapless but also indefeasible. Its norms not only establish an answer to every possible case but the answers so established are unquestionable or *a posteriori* irrefutable. Once again, huge faith was placed in the modern genius. The law was deduced from justice and this work was completed without mistake. As deduced inferences bear the value of their premise, one cannot contradict a law without contradicting justice. And contradicting the principle is wrong *a priori*, for the principle is right or freed of contradiction *a priori*. To the moderns, law provisions were immovable, as "written in stone." [370]

The closure of the list of the causes of obligation was now definite. If the code had divided the obligations into five, it was because there are five causes of obligation, full stop. The lawyer endeavouring to argue for the obligation of an unsung case better avoid the argument of legal change. He is not expected to revise the classification, to say for example, that the classification is outdated, that his case is unjustly missing in the list. What is at work is "Mechanical jurisprudence."[371] His best choice is to make the case's facts look like one of the enlisted categories, to attempt for example, to find an acceptance for his interested promise. Facts can be articulated in different ways, the text of the law cannot.

4.2.1.3. PRIVATE LAW IS AUTONOMOUS, UNCONNECTED WITH SOCIAL LIFE

Not only the judges and lawyers, but also the scholarly jurists blinded their eyes to whatever happened outside of the realities that their positive categories permitted them to see. If the persons of the private law were making transactions by means others than

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1975, to be definitively overturned by Sentencia de 17 octubre de 1975, which, in its seventh consideration, says:

> That the classical principle of the sources of the obligations, recognized by article 1.089 of our Civil Code, has been modernly substituted by the principle which reduces the sources into two: the will—admitting also in this, the unilateral will—and the law.

For a critical review see Federico de Castro y Bravo, "Declaración unilateral de voluntad (Sentencia del Tribunal Supremo de 17 de octubre de 1975)," in *Anuario de Derecho Civil*, 30, (1977), pp. 194-207 and Manuel Albaladejo Garcia, "La jurisprudencia del tribunal supremo sobre la voluntad unilateral como fuente de obligaciones," in *Revista de Derecho Privado*, Enero, (1977), pp. 3-13.

[370] "Si pretendeva di poterlo scrivere sulla pietra nella presunzione che un Codice fosse valevole per quanto è eterno il mondo." Paolo Grossi, "Sulla odierna "incertezza" del diritto," in *Giustizia Civile*, No 4, (2014), p. 230.

[371] "Si concepisce il giurista, e la leggge stessa, quasi come un apparecchio automatico, che, messo in moto con un impulse meccanico, dovrebbe dar fuori in ogni caso, egualmente in modo meccanico, una sentenza precisa." Giorgio Del Vecchio, "La Crisi della Scienza del Diritto," in *Studi sul Diritto*, vol. I, Giuffrè, Milano, 1958, p. 168

contract, they were not making private law transactions. Offeror and offeree restricted their views to the persons who make transactions, obligation and property their views on the factors commuted in voluntary transactions, and agreement limited their views on the interactions that licitly affect the parties' rights. Legal science is not concerned with social reality. The object of legal science consists of learning the positive legal provisions, abstracting the categories that give these legal provisions an intelligible form and exposing the same positive legal provisions in a systematic order. Whatever is inside the text that the scholar takes as authoritative is a matter of law, and whatever is outside of such text is anything but law. In focusing only on the rules laid down in authoritative texts, the lawyer is thought to be insulating law from religion, morality, politics and economics. The reduction of law to written law gives warrant to the substantive, operative and academic autonomy to private law.[372]

The stage was set for satire. Jurists more aware of the reality beyond the positive law would caricature formalists as creatures living in a "heaven of concepts." Jhering's famous joke addressed the Pandectists' indifference towards life in social reality.[373]

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[372] This conception of autonomy presupposes a strong dichotomization of facts and norms, of life in civil society and of justice and its norms. See the elocuent words by Paolo Grossi, "Sulla odierna "incertezza" del diritto," *op. cit.*, p. 230: "Legalism and formalism were the only channels through which the law could stream. Society and history, magmatic reality, thanks to artificial but efficacious institutional mechanisms streamed at the outside without possibly contaminating with their contact the purity of the official law willed from above and from the above proposed to the obedience of passive addressees […] the jurists, specially the civilists, inebriate themselves with abstractions and purities; proud of having a pure science, meta-historical and, as such, freed from every carnal weigh. All this construction, both artificial and ingenious, encountered itself with the turbulence of which the new century was bearer."

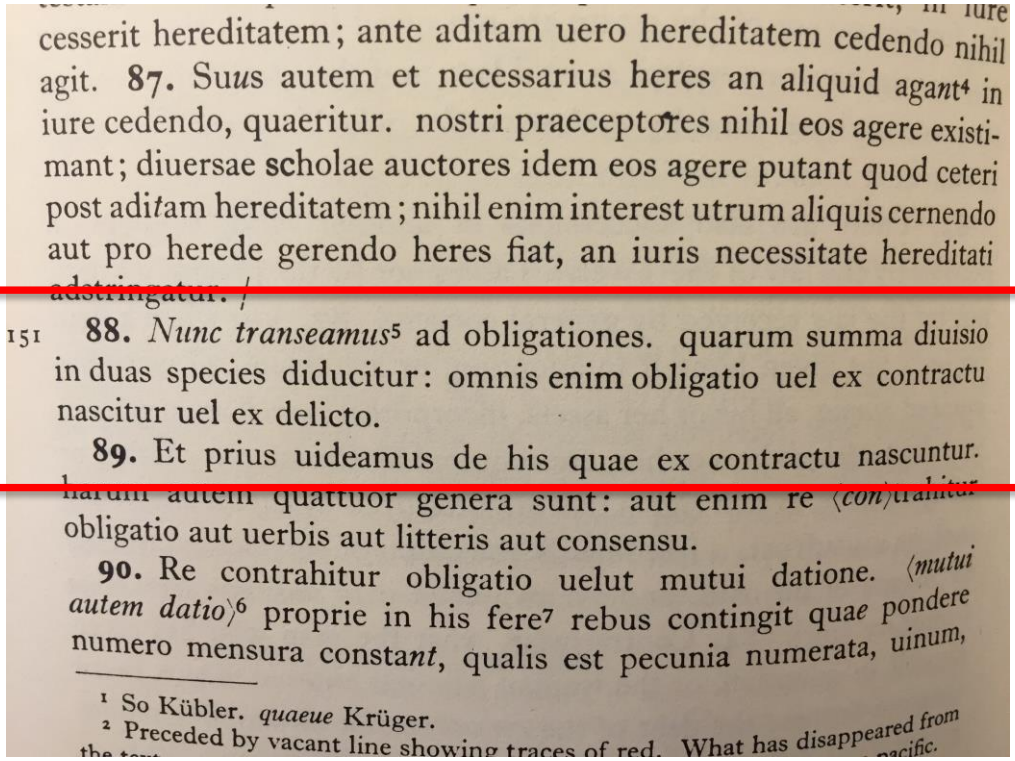
[373] Interestingly enough, the issue of promises appears in Jhering's *Ridendo dicere vero*. The scene portrays Jhering and the spirit who guides him in the heaven of concepts walking around the cabinet of pathological concepts, the place of the legal concepts that practical lawyers have deformed, by practical or utility reasons. The spirit exclaims:

> A unilateral promise, not accepted by the other party, namely, that hangs in the air, without having yet fallen in a determinate person, has now the power to obligate the promisor! Is something like that thinkable? No, certainly not, as one cannot imagine a horse runned by the reins hanging from its neck; it is necessary that the horseman take them in his hands. The unilateral promise is a rein that no one has in his hands yet. Can that promise obligate […]?

Jhering, Rudolf von, *Bromas y veras en la ciencia jurídica. Ridendo dicere verum*, Tomás A. Banzhaf (exquisite Spanish) translation, Civitas, Madrid, 1987, p. 259. A more contemporary trip into the psychology of the caricatured formalist:

> Grid thinking can thus spin out of control. In the name of greater precision, clarity, and rigor, grids can sometimes develop into extraordinarily intricate constructions with no obvious use-value to anyone other than those who are involved in refining the grid. Disagreement can occur at levels of excruciating detail. In one sense, this is a disciplinary defense mechanism: so long as grid thinkers are preoccupied with tiny disputes, the big picture remains incontestable — indeed beyond view. At the same time, however, this is a pathology: the grid and its custodians become increasingly insular and divorced from other enterprises, so that when a reality principle is finally en- countered, it is in the form of a crisis.

"The aesthetics of American law," *op. cit.*, p. 1065 (notes omitted).



cesserit hereditatem; ante aditam uero hereditatem cedendo nihil agit. **87.** Suus autem et necessarius heres an aliquid agant[4] in iure cedendo, quaeritur. nostri praeceptores nihil eos agere existimant; diuersae scholae auctores idem eos agere putant quod ceteri post aditam hereditatem; nihil enim interest utrum aliquis cernendo aut pro herede gerendo heres fiat, an iuris necessitate hereditati adstringatur. /

151 **88.** *Nunc transeamus*[5] ad obligationes. quarum summa diuisio in duas species diducitur: omnis enim obligatio uel ex contractu nascitur uel ex delicto.

89. Et prius uideamus de his quae ex contractu nascuntur. harum autem quattuor genera sunt: aut enim re ⟨*con*⟩trahitur obligatio aut uerbis aut litteris aut consensu.

90. Re contrahitur obligatio uelut mutui datione. ⟨*mutui autem datio*⟩[6] proprie in his fere[7] rebus contingit quae pondere numero mensura constant, qualis est pecunia numerata, uinum,

[1] So Kübler. *quaeue* Krüger.
[2] Preceded by vacant line showing traces of red. What has disappeared from the text pacific.

A landmark of private law theory, the classification of the obligations. Gaius says "Let us now proceed to obligations. These are divided into two main species: for every obligation arises either from contract or from delict." (Francis de Zuleta, ed, The institutes of Gaius, Part 1, Text with critical notes and translation by Martin de Zuleta, at 179.)

Picture taken from Francis de Zuleta, ed, The institutes of Gaius, Part 1, Text with critical notes and translation by Martin de Zuleta, p. 178.

4.2.2. YES, WE MUST! THE TRUE LEGAL FORMALISM

There is a better understanding of legal formalism. This formalism does not neglect the changes in social life, or it tries to resolve the tension between the inexorability of change that has proved a truism of contemporary society, and the vocation of stability that is characteristic of law. For formalism, norms like Art. 1097 of (1865) Italian Civil Code do not serve to deny atypical legal demands. On the contrary, these norms remind us that the causes of obligations are instances of a practical idea of reason, an idea that is there precisely for advancing new legal demands. We hold that formalism could not be a school of thought that neglects change in law. Donatello's David could have been molded in mud rather than bronze. Today artists manifest their visions in music and light, a thoroughly new experience. So new social practices and exigencies may be a matter for new law. Legal formalism indeed expects its matter to vary. Allow me to develop these theses.

4.2.2.1. JUSTICE CAN BE NEVER EXHAUSTED

There is one thing that law cannot but accept. This is that human relations such as harming another person, exchanging goods, intervening benevolently in the affairs of another, paying money by mistake, are as exhaustible as the freedom law assumes humans host, use and unfold in their impossibly innumerable contexts. Think of the interactions that life in modern society brought into existence. Making interested promises is one example; the case of damages by dangerous machines or harmful products is another. Lawyers had no words with which to say things about the issues arising in such new contexts and yet, the obvious juridical relevance of these issues urged them to speak. Today we are struck by the phenomenon called the "network." The fact is that when you have fixed your attention on a type of interaction, innovation brings a new one, which reproduces this interaction (inter-absent agreement is a reproduction of the harm-length agreement), or imposes itself as an alternative (agreement and interested promise are different modes of exchanging things). [374] Human relations are inexhaustible and therefore they cannot be enumerated once and for all.

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[374] See 1.1.3. Let me clarify. In this paragraph I am arguing that private law cannot deny what I will call the "innumerability of cases." Private law cannot deny the ever-growing diversity of cases due to two reasons, one is theoretical and the other is historical.

The theoretical point is the most powerful: The idea of free will is one of the core private law assumptions. It is what private law thinks inhere in humans and makes them capable of deciding by themselves and taking responsibility for their deeds. But the idea of free will comes with the idea of creativity or, to be more precise, the possibility of invention. If humans are not the sum total of their past experiences, it is because they can bring new things to life, in Kantian terminology they can be the cause of their mental representations. In relation to our theme, we can say that the reality of agreed exchanges, torts, benevolent interventions in others affairs and all the relevant private law interactions resulted

Yet law needs determinate ideas about human relations. The causes of obligation, like all legal relations, are exactly that. They are more or less defined ideas about how certain human relations must unfold. Contract, for example, is about the practice of agreeing to a present or future exchange. Aware of its juridical relevance, (it is my interpretation), the law moulded it with one of its high-forms. Namely, it determined agreed exchanges as a cause of obligation and labeled the emerging systematic concept with private law names—hence our just, precise, intelligent and venerable "contract." Law did the same with the realities of harming another person, intervening benevolently in the affairs of another, giving money without reason and many others. Contract, tort and unjust enrichment are the stable and more or less exact terms with which private law tries to ensure that human relations receive equal treatment.

We see the issue here. On the one hand we have that possible legal reality is inexhaustible, or as we can also put it, innumerable, and on the other hand we see that law needs to determine its reality, or as we can also put it, enumerate the facts that constitute it. We see a tension between the innumerability of the relevant legal reality and the law's need to determine in numerable categories all relevant reality. How do we resolve it?

Formalism says: "Justice".

Justice permits private law to update itself to "the constantly growing diversity of cases."[375] Of the universe of human relations it indicates the relations that are relevant for law. The everyday practice of making interested promises is one such relevant reality—it is about a half-willed exchange of values between private actors. Since it manifests a mode of transactional justice (commutative as differentiated from corrective justice)[376] I dare to determine it as a cause of obligation.[377] Justice thus adopts an operative role in private law. It is no longer relegated to the place of death mother of immortal laws. Justice, as equal freedom for each purposive being, or as explicated with the high private-law concepts of personality, thing, subjective right, right violation and right commutation,

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from processes where obviously not one but many individuals collaborated through their own creativity—some making these transactions, others defining them. For this reason, private law cannot but accept the innumerability of human relations. It may not be able to categorically affirm that life will bring unprecedented social interactions. But it cannot deny it.

The historical proof has become prosaic. See an interesting account in Giorgio Del Vecchio, "La crisi della scienza del diritto," *op. cit.*, p. 179.

[375] F. C. von Savigny, quoted in Joachim Rückert, *op. cit.*, p. 63.

[376] See, 1., 4.3, and 6.2.

[377] See 5.

indicates to us which of the universe of social interactions are relevant for law, that law could and ought itself order.

So formalism would never say that a classification enumerated all the causes of obligation.[378] Formalism offers a better interpretation for dictums like Art. 1097 of the (1865) Italian Civil Code. They must be taken to be the law's explicit invocation of justice. [379] In opening its book on obligations with Art. 1097, the (1865) Italian Civil Code announces that justice in transactions is the governing principle of its law of obligations. It is the idea with which contract, tort and the other causes of the obligation have been determined. And because this statement is there for purposes beyond the rendering explicit what is latent in the text, the classification must have an additional significance. Its fundamental practical significance is to permit lawyers and judges to detect unseen injustices and establish the right precedents to correct them. The point of articles like 1097 of the (1865) Italian Civil Code is to tell the reader that even if the code has not written about this or that claim in the following pages, the book lies open for it to be entered. A dictum classifying the obligations in accordance with their causes represents the gate through which the jurist can lead new causes to the law of obligations.

4.2.2.2. PRIVATE LAW NORMS ARE HUMAN PRODUCTS AND THEREFORE FALLIBLE AND DEFEASIBLE

In the legal formalism justice is indefeasible, rather than the norms and concepts that realize it in a given social stage. Freedom of the will, the usability of objects, the idea of right and common space[380] are authoritative postulates in the sense that we cannot disregard them when solving cases without doing other than private law. But the fact that we put our efforts into bringing justice to the case at hand does not warrant the success of our enterprise. We could have gotten it wrong, or the reality for which we developed our dictum changed without someone showing us our mistake, rendering our previously valid dictum evidently inadequate. If women fell outside of the category of person some decades ago, it was not because the category of person was unjust. It was because no one could convincingly show that the proviso excluding women got it wrong, that what is right is to treat women as equally free as men. One could have made the argument that it is

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[378] "The logical form of law is found in every juridical proposition, but is not exhausted in every one of them nor in their sum." Giorgio Del Vecchio, *The Formal Bases of Law*, *op. cit.*, n. 61, p. 82.

[379] It is not by chance that Gaius, the first one to classify the obligations in accordance with their causes, divided the causes of the obligations as Aristotle divided the modes of corrective justice. Compare Aristotle, *Nicomachean Ethics*, *op. cit.*, Book V, Chapter 2, §13 with Gaius, *Institutes*, III, 88.

[380] See Introductory Part.1.1.

right that the woman remain outside the legal scene and that they should be incapable of response for contract and tort claims. This argument's validity would not imply that the recognition of women as capable persons came with a transformation of the justice of private law. It might have been that women couldn't show themselves in competition with men, as comparably free individuals.[381] We discovered that they are so, or simply that what some took as a protection was more of a paternalistic bound. Gladly, the legal character of an adult woman is a very easy case today, and justice as equality remains unchanged since Aristotle's formulation.

A dictum classifying obligations in accordance with their causes cannot be taken as the final enumeration of the causes of the obligation. Such an interpretation would not only render the classificatory dictum otiose,[382] but also deny value to dictums other than the one that is accepted. If we think that the only valid classification of obligations is the one that was established by the nineteenth-century legislator, then we must be ready to maintain that the preexisting classifications, those on which the nineteenth century legislator drew, were either non-juridical classifications or juridically mistaken classifications. This conclusion does injustice to the private law's past determinations. My interpretation of the classificatory dictums is comfortable with the fact that the causes of obligation changed.[383] We have seen how, since their invention in classical Rome, the causes of obligation have on the one hand changed their content, and on the other hand split themselves from two to four to five, to now fuse themselves into three, all within the same structure. Formalism believes that each stage of the development was the adequate to its time. It interprets Gaius as classifying the obligations into two because the cases where the call for obligations pertained were classifiable into two groups. And it

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[381] Curiously: "Our ancestors saw fit that "females, by reason of levity of disposition, shall remain in guardianship, even when they have attained their majority." Table V, 1 of the Law of the XII Tables (451-450 B.C.) http://www.csun.edu/~hcfll004/12tables.html (27-07-2015)

[382] I have been inspired by this passage of professor Weinrib's *The idea of private law*, *op. cit.*, p. 223:

> Legal formalism arrays the particulars of external interaction under a coherent set of juridical categories, and therefore ultimately under the forms of justice. Formalism thereby illuminates the particular through the general: the particulars are the inexhaustible ways in which persons can externally affect one another, whereas the forms are the general patterns that order these particulars in a juridically coherent way. The difference between the generality of the forms and the particularity of specific interactions is precisely what allows the former to be principles of ordering for the latter. It also prevents the law's treatment of all the possible particulars from being exhaustively specifiable by theory. Such exhaustiveness would mean that the particulars are theoretically as intelligible as the forms through which they are understood, and would render otiose the formalist's invocation of form.

[383] "The idea of the variety of historical legal manifestations actually proves the assumption of a common form, for we could not speak of juridical evolution if we did not first accept a certain abstract unity as common to all its phases, in whose regard a continuity of process was apparent." Giorgio Del Vecchio, *The formal bases of law*, *op. cit.*, n. 47, p. 68.

interprets the French as reformulating the classification not because they found a better one, but because they found it insufficient to their reality.

This amounts to say that a legal classification, as logically tight as it may appear, can always be revised or updated. One possible question is how well the classification achieves its purpose of enumerating the juridically relevant relations. If it fails, the interested party can revise it. Lawyers, judges and scholars can defy a classification with juridical argumentation.

4.2.2.3. THE PRACTICAL MISSION OF PRIVATE LAW IS TO SERVE REALITY WITHOUT LOSING ITS CHARACTER

Autonomy is no longer simply the law's status after its divorce from religion, morality, political power and economy. The formalist has a different conception of autonomy. Autonomy is the status, or if you wish, the dignity of the law that molds itself to a reality without losing its own character. Autonomy thus no longer offers solace to the jurist by warranting her to do her job correctly by solely fitting cases into written laws. In its new conception autonomy does not comfort. On the contrary, autonomy shakes, awakes, demands an active attitude to the jurist, a confrontation with the messy and the unexplored, the socially sensible. It expects that the jurist assume the law's spirit to make it say of a social need something that both gives reasonable satisfaction to the pressing social demand and is coherent with the law's most characteristic precedents. To order the emerging social reality without losing its own character is, put differently, "the practical mission of law in life."[384] I want to dedicate some lines of argumentation to identifying the locus of this call. I will suggest that it comes from the very essence of private law. We listen to the law's vocation in the gathering of the law's most juridical of concepts.

Private law observes human relations and understands them through the logic of justice. Where the layperson sees a handshake at a marketplace, private law sees two persons that give and receive on the basis of an enforceable agreement. Where the layperson sees a car accident, private law sees that a person used the freedom of another, caused damage and contracted the obligation to repair it. To understand these relations through the logic of justice, private law necessitates juridical concepts, images of reality that were ordered through the logic of justice and that can be seen in reality again. To illustrate: I, a

[384] I take this expression from Emil Lask, "Legal Philosophy," in Patterson, Edwin Wilhite (ed.), *The legal Philosophies of Lask, Radbruch, and Dabin*, Kurt Wilk translation, Harvard Univ. Press, Cambridge Massachusetts, 1950, p. 37.

16th/17th century jurist,[385] sought to determine contractual behavior through the logic of commutative justice. I first had to develop the concept of "person," or of an equally free individual able to decide for himself. Then I had to develop the concept of "ownership," or the power of someone to exclude others from the disposition of a thing. Only after having developed these two concepts could I develop my idea of "contract," or exchange of accepted promises. Now I have a set of concepts for understanding contractual behavior through the logic of justice. As I saw a handshake at a marketplace I could recognize a just exchange, for I saw two persons with ownership over things exchanging them through reciprocal (accepted) promises.

At some point in time, through the work of many jurists, the just private law achieved a high degree of *systematicity*. Characteristic of this system is the fact that *there are relations among its constituents*. The concept of contract is paradigmatic: The latest version of the just contract is composed by an offer, an obligation, an acceptance and an object-cause (or consideration). These are components or "sub-concepts" that make up the concept of contract. Each one of these sub-concepts has sense insofar as you relate it to its parallel concepts. Without their parallel concepts, they make no sense—they are unintelligible. Put differently, you will not know what contractual offer is if you do not know the concepts of obligation, acceptance and consideration. Such is the relation of these sub-concepts that, once you have learned how to use them, thinking of one demands thinking of the others. Someone who thinks of a contractual offer is someone who, by necessitation, is thinking of obligation, acceptance and consideration. If someone attends to a reality implicated in the concept of offer—Alexis says: "Dear Bosko, I will give you X if you give me Y"—and aims to understand it juridically, this someone is not only thinking of offer, but also of obligation, acceptance and consideration.

The concept of contractual offer demands the concept of obligation, acceptance and consideration. A contractual offer *demands the presence* of the concepts that help it give a juridical account to a specific reality.

Now, the concept of contract is one of the causes of obligation. You could build the other causes of obligation in the same systematic fashion. Tort, for example, could be determined with the elements of illicit act or wrong, causality, damage, responsibility and obligation. Let me elaborate how these elements make up a tort with an example:

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[385] I am inspired by Hugo Grotius, *The Rights of War and Peace*, edited and with an introduction by Richard Tuck, Liberty Found, Indianapolis, 2005, especially Book II, Chapters XI-XII. I think that the account I elaborate in the text is correct. If it is partially correct then take it as a piece of Foucauldian history in the sense of https://www.youtube.com/watch?v=BBJTeNTZtGU (17-7-2015)

Someone running in the city center is, in my opinion, committing an "illicit act." True, persons have the freedom to go around common places. Call this freedom "right of locomotion." But such right is not being well exercised. Why? The city center was established for walking, doing shopping, meeting friends; you would hardly include the image of someone running among the activities that persons do in city centers. In other words, the runner could harm a pedestrian. So, in running in the city center, our agent is acting outside of what is her right—she is endangering another's use of the same right.

Now let us bring another person to the scene. He is walking in a way that, to any reasonable observer, will not be changed—he is likely to continue in the same direction and at the same speed. But he suddenly changes his course. He abruptly stops walking and begins veering from the center of the footpath to the extreme left, as someone who suddenly realized he is going in the wrong direction and wants to come back. In this sudden movement our runner crashes him. She was mindful of him and calculated that he was not going to change his course. Yet, because he made this sudden movement, she crashed into him and made him fall. The harm to the walker's body is what we call "damage."

The damage would have not been caused by the illicit act if, for example, a third party pushed the runner towards the walker. Another factor interrupting the link between harm and illicit act refers to the victim's deeds, as in a case where the victim was not walking but also running. "Causation" means that the best explanation for the damage is the illicit act. The last element of tort is "responsibility." Ours is a case of negligence. The runner did not plan to harm the pedestrian—she just acted imprudently. She knew, or should have known that running in the city center creates undue risk. As her illicit act resulted in damage, she must correct the harm. She has the obligation to rectify the damage caused by her illicit action. Thus is how the sub-concepts of illicit act, damage, causality, responsibility and obligation permit us to represent sad social facts through the logic of justice.

Now that we have elucidated these notions, we can make the point:

In each one of the causes of obligation there is *a sub-concept* that, being only intelligible in concert with its parallel sub-concepts is, at the same time, *relative to or intelligible with sub-concepts of other causes of the obligations*. In the case of the contract, this sub-concept is the so-called "object-cause" (or "consideration"), namely, the right in return for which I gave you a contractual obligation. In the case of the tort, this sub-concept is "causation," namely, the fact that my violating your sphere of right is at the same time my acting outside of my sphere of right. In the case of the uncaused enrichment, this sub-concept is what I will call, "absence of cause," namely, the fact that my enrichment and your

impoverishment has no reason or is unjustified. The relation between these sub-concepts is obvious. They are related in that they all exhibit the *injustice* that an interaction necessitates in order to be a cause of obligation.

We can notice moreover, that the relation displayed by the above-mentioned sub-concepts is somehow different to the relation that each of these sub-concepts exhibits with its parallel sub-concepts. Aligned, the sub-concepts of a cause of obligation make up a totality. They form the basis for imputing an obligation and the obligation itself. They provide, on the one hand, the image of the interaction that produces an imbalance, and on the other hand, the image of the measure that undoes the imbalance produced. You feel that nothing can be added, the work is perfect, complete. But nothing like this happens when you align the injustice concepts. Rather the contrary, they give you the impression of being incomplete, of a sort of to-be perfected thing, in need of more expansion. The relation of the injustice concepts reveals that private law is internally compelled to continue its trend of identifying injustice in realities for the sake of saying what must be done in order to undo them.[386]

I conclude, two main features characterize private law: its will to regulate life in accordance with justice, and the systematic fashion in which it does its work. Justice and system give a distinct character to private law, and at the same time demand private law live up to the exigencies of such character. We listened to private law's systematicity in making such a demand. We could say that justice demands it too:

> Even truer is the Aristotelian concept according to which the judge is the living justice: namely, an organ that assumes in it the spirit of the law, and expresses it in always new formulations, coherent with the vital system, but yet such so as to take it to new developments.[387]

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[386] Article 4 of the French Civil Code says "The judge who refuses to judge under pretext of the silence, obscurity or insufficiency of law can be prosecuted, as guilty for the denial of justice." The Swiss Civil Code of 1912 famously states that in the absence of a statutory or customary norm, the judge must decide "in accordance with the rule he would lay down if he were the legislator[!]" In Perelman, "The obligation to judge goes hand in hand with the judge's power to make decisions, to fill the law's lacunae, to resolve antinomies and to choose one or another interpretation of the text." Chaïm Perelman, *Justice, law, and argument: Essays on moral and legal reasoning*, D. Reidel Publ. Co., Dordrecht, 1980, p. 123. Perelman probably sees the obligation and power as facts established by the legislator. I have tried to explain them differently.

[387] Del Vecchio, Giorgio, "La Crisi della Scienza del Diritto," in *Studi sul Diritto*, vol. I, Giuffrè, Milano, 1958, p. 174. Similarly in *idem*, p. 180:

> Lo sviluppo del sistema giuridico si compie in tal modo, quasi parallelamente, o meglio mediante un influsso reciproco, sotto l'aspetto pratico e giudiziale, e sotto l'aspetto scientifico. È ovvio che l'incremento e la modificazioni degli istituti esistenti, e l'aggiunta di nuovi, quasi per innesto di nuovi rami sopra l'antico tronco, debbono per necessità accompagnarsi a un corrispondente rinnovamento dell'elaborazione scientifica. Non si tratta di mutare I concetti giuridici fondamentali, che rimangono pur sempre I medesimi, come le leggi della

Herein lies the significance of autonomy: True, autonomy is merely procedural. It demands that one be the author of one's own rules. But, for one's rules to be one's own, they must be expressive of oneself. Hence this qualification: Only intelligences with character can be autonomous. But the expressiveness of one's own character will be limited if it is limited so as to always remain the same. Gentlemen no longer wear tailcoats. "Cool" can be cool only in German. Hence my proposition: Autonomy requires intelligent characters to mould themselves to the contexts where they happen to be placed. Autonomous characters order *their* dresses in accordance with the *party's* style. This is the beauty of autonomy: Opportunity. If private law has to govern in a place where contracts are no longer inter presents, where a long chain of causes and effects separate the illicit from the harm, where persons work in networks and make interested promises, where things without corpus abound in spaces without land and wills without bodies are about to come, then private law's orderings must be expressive of these realities, they must govern them in their way. The previous generation of formalists paid little attention to life in civil society. The new formalism takes it as a demand.

A recurrent concern in the work of Tullio Ascarelli is creation in continuity. Someone illustrated his thought with a naturalistic metaphor. Private law appears as an always-growing river. A new legal reality is a tributary of the growing mass of water. Once that confluence was achieved the tributary is indistinguishable from the current.[388] I like this

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> gnoseologia e della logica non mutano per l'accrescersi delle nostre cognizioni in qualsiasi parte dello scibile. Si tratta bensì di quelle nozioni concettuali, che hanno un carattere almeno parzialmente empirico, poichè comprendono un contenuto di esperienze giuridiche storicamente determinate, in guisa da renderne possibile la costruzione in un ordine sistematico. Si tratta, in una parola, della così detta dogmatica giuridica; la quale non deve essere scambiata con la Filosofia, ma rappresenta nondimeno un'attività scientificamente legittima e perfettamente valida nella sua sfera.

[388] This is Norberto Bobbio's illustration of the thought of Tullio Ascarelli: "L'ordinamento giuridico in altre parole è un processo, un sistema in divenire, un tutto mobile e moventesi nel tempo, una specie di corrente di fiume che s'ingrossa per via ma è sempre lo stesso fiume. In questo processo l'interpretazione è come l'affluente che contribuisce alla crescita della massa d'acqua; ma una volta confluito nella corrente, non se ne distingue più." *Dalla struttura alla funzione: Nuovi studi di teoria del diritto*, Edizioni di Comunita, Milano, 1977, p. 259.

Later, these extremely interesting reflections:

> Il discorso di Ascarelli sull'interpretazione si muove sempre tra i due poli della creatività e della continuità. Purtroppo, questo concetto di continuità, nonostante la parte importante che assume nella teoria, non è mai stato svolto analiticamente. Si capisce a che cosa serve (a evitare il facile abbandono alle correnti del diritto libero, cioè della creazione continua); ma non si capisce bene come debba essere inteso. Continuità rispetto a che cosa? Ai princìpi generali del sistema? Ai princìpi dei singoli istituti? Ai precedenti giurisprudenziali? Questa continuità è un'esigenza, cui il giurista deve restar fedele sino ai limiti del possibile? O è un fatto che lo storico constata studiando l'opera dei giuristi in differenti sistemi? Ma se è un fatto, come si inseriscono in questo fatto le cosiddette innovazioni giurisprudenziali, di cui lo stesso Ascarelli porta spesso esempi assai noti? Quale rapporto si può stabilire tra innovazione e continuità? Che le tecniche interpretative siano tecniche miranti a ricondurre i casi nuovi all'unità dell sistema, della finzioni all'analogia, è certo: ma accettando le tecniche per quel che presumono di essere non si rischia di confondere ancora una volta quel che i giuristi dicono di fare con quel che fanno realmente? Ora l'interesse delle riflessioni di Ascarelli sta nella demolizione del vecchio pregiudizio legalistico secondo cui l'interpretazione era prevalentemente un'operazione logica,

idea. Private law is an ongoing normative reality, a system in development, a whole moving in time. Though I would choose another image. Private law is like a group of well-rounded constructs, resembling cultural units which, paraphrasing Plato, roll around what is not law and what it purely is.[389] In their incessant rolling, private law pieces gain and loose in content, split themselves in more, change in outlook, disappear, get reformed and reappear.

4.3. How should we effectuate our construction?

We have an idea of what cause of obligation is and we know that we can construe new causes of obligation. We thus come to the final stage of this part. The question is how do we effectuate the construction? How are we to make a cause of obligation out of the interested promise?

4.3.1. The nature of legal construction

4.3.1.1. It is not a legal judgment

We must, first of all, differentiate adjudication from construction. Adjudicating, as I take it to mean now, consists of explaining a social reality in terms of an *existing legal concept*. For example, a handshake at a marketplace could signify many things, from an image symbolizing the zeitgeist of an age, to "a mechanism for sampling social chemosignals."[390] Yet if you predispose yourself to interpreting it juridically,[391] you will easily conclude that the handshake is a contract. Here you are adjudicating rather than creating a legal concept, because you are putting in place concepts that you know. You have learned how

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mentre di fatto non è mai tale. Ma la continuità non è anch'essa un pregiudizio? Siamo proprio sicuri che l'interpretazione si presenti come continuazione, ma di fatto non sia talora innovazione e rottura? Il mancato approfondimento di questo punto, si può spiegare, a mio giudizio, col fatto che su questo punto Ascarelli abbandona senza parere il terreno della constatazione storica sul quale dichiara a più riprese di essersi posto, e lascia apparire le proprie preferenze ortiche: la continuità non è un fatto constatato, ma un valore chi il buon giurista dovrebbe attenersi. È un'esigenza cui non può rinunciare chi si muove, come l'Ascarelli, tra le due ideologie opposte del concettualismo radicale e del radicale realismo in una posizione che ho chiamata poc'anzi di antiformalismo moderato.

[389] Plato describes sensible things and properties as "rolling around as intermediates between what is not and what purely is" *Republic*, G. M. A. Grube translation and C. D. C. Reeve revision, Hackett, Indianapolis, 1992, 478a-479d.

[390] See: http://elifesciences.org/content/4/e05154#sthash.fC5RnuSx.dpuf (21-07-2005)

[391] Juridical predisposition also precedes adjudication. Two adults signing a formulary in the office of a notary is an image that demands, as it were, the description: "Contract." Yet the observer will always be able to peel off this interpretation and predispose herself to see otherwise. Even if the reality comes as dressed with a legal category, the interpreter can always make the effort to see ethics, society, economy, etc. Artists have the strength to resist the force of triviality. Easy cases predispose us to understand them in their legal sense, but, as we can predispose ourselves to see them differently, I consider them objects of (intentional) interpretation.

to use the concepts of offer, acceptance, consideration and obligation and it was easy for you to apply them to the case.

An interested promise is not an easy case for adjudication. The best choice is to see it as a contract. Explaining an interested promise with the language of contract places you in a difficult position (See 1.2.3) however. This is so because the concepts that "offer," "acceptance," "obligation" and "consideration" connote were determined to give (juridical) order (and existence) to a reality that is different to the reality called "interested promise." Namely, the fact of agreeing that I will give you something and you will give me another thing in exchange is significantly different to the fact of giving you something so that you create the chance that you will do something I want. In this context, and insofar as we want to legally regulate the atypical reality, we must construe a legal concept.

4.3.1.2. IT IS, IF YOU WANT, A JURIDICAL JUDGMENT

When the practice you are confronted with is very atypical, you can dare to build a new legal concept.[392] This requires from you a very ingenious judgment. You are no longer involved in the task of applying one of the readily applicable legal concepts. You have to elaborate a legal explanation *for* the atypical reality—see and state law without using applicable categories. If you are lucky enough, you will see the explanation as a reflection of a high-legal concept, like the idea of authorization, subjective right or cause of obligation.

Yet the process of making sense of a reality with an applicable legal concept is very different to the process of making sense of a reality with a high legal concept. In the latter case, you have to convince your audience that the reality that you are confronted with manifests the reality contemplated by the readily applicable legal concept. You have to say; "Look, there is an offer, an acceptance and a consideration," "look, there is a human body under the control of a free will." When your task is about explaining a reality in terms of a high legal concept you have to elaborate the contents that would render those abstractions applicable. You have to develop appealing answers to questions like "What is the thing that is the object of the right?" "What are the exclusive powers that a will has

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[392] Terminology and meaning are not uniform in the scholarship. Rudolf Stammler, for example, calls "juridical construction" to the act of elaborating concepts from the material given by the law. "La elaboracion cientifica de las normas de un derecho historicamente dado se llama desde antiguo construccion juridica." *Tratado de Filosofía del Derecho*, Wenceslao Roces translated, Reus, 2007, Madrid, p. 391. Aleksander Peczenik goes further to say that legal construction or, as he calls it, juridical science consists also in creating "new concepts by generalizing logically possible cases." *Scientia Juris: legal doctrine as knowledge of law and as a source of law*, Springer, Dordrecht, 2005, p. 35.

over such a thing?" "What are the components of the interaction from which the right emerges?" The judge sees a reality, imagines an idea of how to explain the reality in terms of a high-legal concept, and effectuates the explanation. This explanation (which, as we will see, must be constructed with one of the "legal techniques" and presented in "legal language") is a legal construction. So, if I had to define it, I would say that a legal construction is a synthesis of an inapplicable legal concept and the image of a new operative concept. If adjudication applies operative concepts, legal construction created them. So construction, in contrast to adjudication, brings about new legal realities. One can think of construction as a juridical (as opposed to a legal) judgment because, to come about, to produce a new legal reality, construction utilizes one of justice's most abstract representations.

4.3.1.3. THE THIN DISTINCTION BETWEEN LEGAL AND CONSTRUCTIVE JUDGMENT

The line separating the two judgments is thin however. Construction could be said to be a legal judgment for various reasons. First of all, as happens in the majority of cases, the new legal entity has precedents in the existing law. For example, the unilateral promise that I will construe in part 5 can claim precedents in the various arrangements that I have criticized in Part 2. So, one could say, "Yes Javier, this legal concept of yours is very nice and, as you put it, it has been never seen before, but the construction brings no legal innovation. To start with, it is the reconstruction of something that, although in different forms, already existed in the law."

This criticism cannot be correct. True, my unilateral promise is not the first legal idea recognizing the promise of a reward, promise of a contract and fake gratuitous promises. It is also true that my unilateral promise is not the first attempt to justifying the irrevocability of these promises on the grounds that the reception of the promise causes a benefit to the promisor. However, my unilateral promise would change the law that integrates it into its system. Owing to its semi-abstract outlook, the unilateral promise brings with it a range of indeterminate cases.[393] The legal system that recognizes the unilateral promise is a legal system that would not only recognize the various typical

[393] In this sense:

> […] the action of the jurists, appears at first sight a dependent one, receiving its materials from without. However, by their giving to the materials so presented a scientific form which strives to disclose and perfect the unity dwelling in them, there arises a new organic life which shapes and reacts upon the materials themselves, so that from science as such, a new sort of generation of law incessantly proceeds.

Friedrich Carl von Savigny, System of the Modern Roman Law, William Holloway translation, t. 1, Higginbotham, Madras, 1867, pp. 37–38.

interested promises that it already recognizes but also all promises cognizable as unilateral promises (see 5.1.2.)

But there is a stronger criticism. It says: "Your unilateral promise cannot be new in any sense. For, if the reality that you are construing is to be recognized as a legal reality, the reality must, before your construction, have been legal. The fact that you are saying 'there is a juridical reality that is not recognized by the law' indicates that you believe that law unfolds from a principle. And the fact that you believe that law unfolds from a principle is due to the fact that you read X or Y principle in the positive legal material. If the principle with which you recognize the 'new' reality exceeds (in the sense of explains more than) the available legal material, then your principle is not the principle of law. You must recognize the 'new' reality with a principle that covers the material available in the documents that you consider to be law and does not exceed them. And if that is what you do, then what you call the 'new legal reality' was law before your calling it thus."

This is a fair point, and it gives me room to elaborate further the relation between justice and (positive) law. When the jurist uses legal techniques to explain a reality in the logic of justice, the jurist is, paraphrasing Weinrib, showing the possibilities that were implicit in the legal materials.[394] But then the question arises: Can there be any new law? I would say that no juridical law is new if you consider that someone else could have done exactly what the legislator did. Look at the practice of promise-making and think: "Some cases show a commutation of a voluntary obligation for the value of a chance." Wonder, "How could we explain this section of reality in a way that it appears as another cause of obligation?" Articulate the interested promise in concepts that are, with different content, present in the contract, tort and unjust enrichment, and culminate by communicating the developments in words that sound like traditional private law words. Certainly, someone could have done that before I did it and sound as convincing. If we reason in this way, then my creation is not new in any sense. It was there before I, ready for anyone to talk about it. Having said that, I beg of you the following compromise: Agree with me in that the first who talks about a legal idea is its author. Legal ideas are new even if they were there to be appropriated. Constructions are new in the sense that they are the result of a first judgment. The judgment was first in determining something that has always been determinable. So, to save my position, I say, "Well, when I talk about 'legal construction' I am saying 'first determination.'"

[394] Ernest Weinrib, *Corrective Justice*, *op. cit.*, p. 297-8.

4.3.2. THE PROCEDURE

4.3.2.1. PREDISPOSE YOURSELF TO INTERPRET JURIDICALLY

The jurist will be confronted with a thoroughly atypical reality. The first thing she must do is to get rid of legal preconceptions. What do I mean? The atypical reality could appear to her as a complicated case, one lying in between one or another legal category. She will consider: Should I pay attention to the promise and imply an acceptance so as to talk of this reality as of a contract? Or should I better pay attention to the plaintiff's loses, find some guilt on the part of the promisor and make it look like the tort of deceit? The constructive judgment does not construe facts to make them fit with law; the constructive judgment directly and strictly creates law.

The first advice hence is that the jurist must resist all temptation to explain the case in the language of the positive law to see in it its possible juridical implications. She must, in other words, find law without the legal forms.

4.3.2.2. MIND THE SOCIAL REALITY

Generally jurists do not make up social practices. What we do is to elaborate on the basis of what we hear from others. We draw on many sources, including sociologists, economists, moralists, merchants, politicians, one's own culture and weird legal decisions.

In my opinion sociological research is the best inspirational source.[395] As the sociologist is not constrained by legal concepts, she can see beyond or even without the categories established by law. Sociologists see beyond what our legal categories would enable them to see when they look at reality that positive law straightforwardly ignores. For example, the sociologist could inform us that a contractual party engages herself not only with her counterpart but also with her counterpart's clients and providers, or that business people solve their issues outside courts, with non-adversarial modes of solving conflicts. On the other hand sociologists see without legal categories when they approach realities for which law does have a category. It could be the case that the law has long (ad)dressed an atypical reality with a typical legal concept, disguising its genuine morphology. Indeed, this has been the case for my interested promises. My understanding of the authentic morphology of the interested promise is very much due to the developments of the sociological observations of Melvin Eisenberg. If it weren't for the sociological part of

[395] The example of the sociological approach I have in mind is I.R. MacNeil, *The New Social Contract, An inquiry into Modern Contractual Relations*, Yale University Press, New Haven, 1980.

Probability and Chance in Contract Law, I would have still thought of interested promises as implied contracts (the English law approach in 2.2), atypical delicts (the French law approach in 2.3), *obligationes ex lege* (German law in 2.4) or as (moral) promises (the unilateral promise tradition, See 3).

The jurist must read sociology, but with scrupulous care. We are here not to use legal words to describe what society does, wants or is assumed to want. What we do is predispose ourselves to finding possible juridical explanations for legally unprecedented practices.

4.3.2.3. CHARACTERIZE IT WITH A LEGAL TERM…

The first question we ask is what kind of legal reality this reality resembles. What is the juridical nature of the phenomenon under examination? The jurist must think of a higher concept than the concept she or he intuits that the thing is. We call this process technical characterization.

Take my PhD as an example. Its target is not that difficult. As Eisenberg would say, [396] the point of the interested promise is to induce confidence in the promisee so he creates a chance for the promisor. The promisor makes the promise in order to obtain value from the promise: the so-called "value of the chance." It is obvious that if the interested promise qualifies as a legal concept, it qualifies as a voluntary cause of obligation, a commutation of an obligation for "the value of a chance."[397] So we have to approach the interested promise from the perspective of the high-concept of voluntary cause of obligation.

4.3.2.4. …AND STATE WHAT YOU HAVE CHARACTERIZED.

Having overlapped the two concepts in our thought, we must write about one in a way that a reader might understand the other concept. In other words, we must describe the interested promise in a way that a jurist could find the conditions that make up every cause of obligation. What is the thing that the promisor owns and wants to transfer to the promisee? What is the interaction whereby the promisor disposes and the promisee acquires? And how is it that, in the interaction, the promisor not only disposes of what the promisee acquires but also acquires what the promisee disposes? What is what the

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[396] Melvin A. Eisenberg, "Probability and Chance in Contract Law," UCLA L. Rev., 45, (1997-1998), pp. 1005-1076. See 1.1.3.

[397] See more in 1.2.1. and 4.3.3.1.

promisee owns and disposes? In answering these questions we will be determining legal concepts.

(A) LEGAL STATEMENTS

Private law offers at least five techniques or means with which we can determine legal concepts.[398] My favorite one is what I call "legal statement." I would use this technique if, for example, I talked about the right that the promisor has and wants to transfer to the promisee with categorical propositions like "the promisor must own a certain amount of disposable freedom," "the promisor determines part of his freedom by ideating a credit right," and "received promises transfer credit rights." Legal statements are useful when the jurist wants to map out legal ideas, describe the constituents of a legal relation with very indicative, maybe figurative words - French Civil Code style.[399]

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[398] For a more comprehensive understanding of "legal technique" see: Gény, Françoise, "The Legislative Technique of Modern Civil Codes," (Ernest Bruncken translation), in Vv. Aa., *Science of Legal Method*, MacMillan, New York, 1921, pp. 498-557.

[399] Let us take a brief look on how the writers of the French Civil Code synthetized justice and social reality in gentle, even literary legal statements.

Art. 544 of the French Civil Code defines property in the following way; "Ownership is the right to enjoy and dispose of things in the most absolute manner, provided that use is not made of them which is prohibited by laws or regulations." Art 545 follows to make it clear that it is up to the owner's free will to decide if his thing will be disposed: "No one can be forced to yield his ownership, unless for public purposes and with just and antecedent compensations."

Having made these definitions, the Code now moves to govern an issue that could take place, occur as a matter of fact in the life of (mainly land) owners. "Ownership of a thing, either movable or immovable, gives a right on all which it produces and on that which unites with it accessorily, either naturally or artificially. Such right is called right of accession." This statement is not about your entitlements as an owner. Article 546 gets into the fact that things may multiply themselves, produce new things, receive annexations and generate emoluments. What is to be the status of the new things? All manner of produce borne of your thing, and all that happens to attach to it inseparably, are accessories of yours; belonging to the owner of the principal thing by right of accession. Why is this so? Well, given your authorization to acquire ownership, that all persons must tolerate that you exclude them from the acquisition of things and bear a duty to respect you as the exclusive master of what you acquired, it becomes axiomatic that everything occurring within the boundaries of your territory, nay, without externally affecting the lives of others, is a matter for the owner to be concerned with and of which he owes no explanation to others. Then, if a thing of yours happens to produce another thing, you, for the law, are equally owner of the two things. (In reality it is as if nothing really happened, see 4.1.3.3(b)).

Art. 547 further develops the right of accession and Art. 548 addresses the very sensitive issue for which the 546 determination was actually made. Art 548 solves a transactional issue; "Fruits produced by a thing belong to the owner only with the obligation of reimbursing the costs of labor, works and seedings done by third parties." If the accession or production occurred because of the work, seeding or labor of another (I've always wondered why the Code talks about third parties) the just solution is that the owner keeps the produce or thing and compensates the work, seeding or labor of the producer.

Some 150 years after of the code's enactment the law number 60-464, 17 May 1960, Art. 1 regulated an issue arising in the application of Art. 548. The price for the work, seed or labor sensibly increases since the claimant performed the work and the defendant has not yet paid for it. Inflation might have been unusual or unimportant in Portalis' world. Since it was important in 1950's France, the 1950's French

Other techniques will be more suitable for answering other questions. So if I wanted to talk about the legal significance of the new cause of obligation, I would choose the language of "norms." [400] "The promisor incurs a promissory obligation where the promisee receives the interested promise and creates the value sought by the promisor."

A now classic understanding of norms has it that norms are conditionals. Norms are propositions composed by a "situational case" and a "legal effect," where the situational case is the factual condition for the legal consequence. Norms accordingly would generally adopt the grammatical form "If X then Y."[401] But it seems that sentences could make norms without using conditional"if," as when they say "Every doer of X is liable to do Y," or "Where someone does X there is an obligation to do Y." The indicia of a norm seems to be that a sentence contains an applicable piece of law; that it describes the factual conditions under which a legal consequence is in place, from a complete legal relation—like a cause

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jurists had to regulate it. The producer has deprived herself of a value when she did the work and, as she could not value it before its price escalated, justice states the "value is estimated at the date of reimbursement."

[400] This legislative technique appears masterly developed firstly in Ernest Zitelmann's book *Irrtum und Rechtsgeschäft* (1879) and later in the work of Hans Kelsen. Natalino Irti explains it as the jurist's response to the need of rational calculus demanded by the emerging modern capitalism in the late nineteenth century Germany. In legal norms, the contract, like all relations, appears as a situation of fact; the legal relations are legal effects. Natalino Irti, "Un contratto <<incalcolabile>>," in *Rivista Trimestrale di Diritto e Procedura Civile*, (Marzo), 2015, No 1, p. 19.

[401] "In its logical form, the rule of law is an hypothetical judgment that binds a certain case (the illicit act) to a determinate consequence: the coactive sanction. This conception is the only one that permits understand clearly and precisely the fact of the illicit. The illicit is a specific condition of the fact-consequence, of the act of coaction established as sanction by the legal rule." Hans Kelsen, *El contrato y el Tratado, Analizados desde el punto de vista de la teoría pura del derecho*, García Máynez translation, Nacional, Mexico, 1979, p. 94.

To an account of norms from a private law perspective see Mario Allara, *Le Nozioni Fondamentali del Diritto Privato*, t. 1, Giappichelli, Torino, 1939, pp. 1-57, who adds, to the conditional or hypothetical character of norms, the characters of generality, abstraction and bipolarity. Bipolarity in Allara is not a link between the subject of the law and the lawgiver, but a link in between a holder of a right and bearer of a correlative duty:

> the legal order, as a complex of norms that regulate social behavior, comes to attribute to subjects diverse positions or diverse treatments. On the one hand, there is the subject who, in the regulation of the relationship, is advantaged; this is the subject on the interest of whom the regulation is established. On the other hand, there is the subject who in the relationship has a disadvantageous position. It is said that the first subject is the holder of a right (right in the subjective sense) and the second subject is the holder of a juridical duty. To the first subject corresponds the faculty to behave in a certain mode and the pretension that the other behaves in a certain way as against him. The second subject is hold to a determined behavior (positive or negative). The social relation thus regulated becomes a juridical relationship.

Idem, p. 62.

of obligation—to a presupposition of a legal relation—like the conditions under which someone qualifies as a capable person.

Norms can be very effective for conveying legal messages. However, one should not overuse them. Too many norms in a text make an overly technical reading.[402]

(c) Legal classifications

If I were enumerating legal relations, I would be implementing the classificatory technique.[403] For example, "Enforceable promises are the promise of a reward, the promise of a contract and the fake gratuitous promise." In its strong version, a classification is geared to give an exact and exhaustive enumeration of the different kinds within a particular genus. They are known as "*numerus clausus*" classifications because they are not open to the inclusion of new units.[404] Weak classifications, on the other hand, make it clear that the kinds enumerated in the classification are mere examples of the genus. For example, "Wrong discriminations are made on the basis of gender, age, race or some other unjustifiable basis." The statement "or some other unjustifiable basis" opens the classification to the inclusion of new kinds of discrimination.

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[402] "[T]he dry language of the BGB contrasts rather unfavourably with the elegant declarations of general principles in the French Code civil." Basil Markesinis *et al.*, *The German Law of Contract: A comparative treatise*, 2d ed., Hart Publishing, Oxford and Portland, 2006, p. 21.

[403] Private law is rich in classifications. There are traditional debates about classifications. The classification of the obligations can properly be called a traditional issue of private law. See 4.1.1.1. and the discussion in 4.2. Another similar issue is the classification of the subjective rights. A recent example in Shalev Ginossar, "Rights in rem: A new approach," in *Israel Law Review*, vol. 14, N. 3, (1979), pp. 286-336.

[404] I agree with Werner Goldschmidt in that "The point of divisions is to give an exact and exhaustive vision of a concept's extension." *Introducción filosófica al Derecho: La teoría trialista del mundo jurídico y sus horizontes*, 6th ed., Buenos Aires, Depalma, 1987, p. 351. But I must add two notes. First of all, exhaustiveness is the point of strong or perfect classifications. There are merely enumerative classifications, which could be very useful.

In second place, the fact that a classification intends to exhaust its subject matter does not entail that the classification has indeed exhausted the subject matter. Classifications are human products, the best of the aspirations of a human intellect but no more than aspirations realized in facts. This means that it should be possible to contest *numerus clausus* classifications. Obviously, the argument that one must elaborate to prove that a case must be contemplated amongst the cases contemplated in a non-exhaustive classification must be (qualitatively) different to the argument that one must elaborate to prove that a case must be contemplated among the cases contemplated in an exhaustive classification. An example of the former kind of argument appears in 4.3.2.4 (d) and 4.1.5.1 note 115, where one applies a concept like "contract" to a case, showing that something unknown to the law (an atypical contract) is in fact like the (typical) contracts regulated in the Code or precedents. This PhD is an example of the latter kind of argument,, where I firstly had to build the model common to all the types and then rather than apply the model to the case, determine the case in accordance with the model. I did not have to tell the reader "Look, that is an offer," I had to tell the reader, "Look, those statements of X can be represented as a legal interaction, which we will call promise." In other words, I did not apply a concept but construed it. See the discussion in 4.2.

(D) LEGAL CONCEPTS

I will now turn to legal concepts in strict sense.[405] To make a legal concept you must have first defined a legal phenomenon (see 4.3.2.4(a)). "A contract is an agreement whereby two persons exchange rights." This is a definition of contract. The concept will be made out of the partition of the definition. The task is to parcel the definition into systematically related elements, or parts. [406] For example, the concept of contract, based on the definition given above, could be divided into four parts: offer, obligation, acceptance and consideration.[407]

Both classification and conceptualization work with already juridified phenomena, and are concerned with division. However, they differ in this: partition divides a definition into parts (parallel verticals) and classification divides a definition into species (parallel horizontals). It is clear what we can do with the species of a legal relation (see 4.3.2.4.(c) and 4.1.5.1). What do we do with a legal relation's parts? Parceling a legal relation offers a set of elements through which the jurist can perceive, explain and govern every possible instance (or species) of the legal relation. Compare, for example, Gaius's classification of the Roman law consensual contracts with Benson's conceptualization of the common law contract.[408] Both Gaius and Benson are talking about more or less the same thing: the

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[405] See La Pira's work in the bibliography (private law theory).

For a defense of conceptual analysis in law see Dietmar von der Pfordte, "About concepts in law," in Jaap C. Hage, von der Pfordte, Dietmar (eds.), *Concepts in law*, Springer, Dordrecht and New York, 2009, pp. 17-33, where what I call "legal concept" is one type of concept, which Pfordte calls "determinatio ex partitio". Idem, at 24.

[406] These parts are systematically related because the intelligibility of one demands the intelligibility of the others (see 4.2.3.3.)

You can find a legal concept in in Gaius, *Institutes*, IV, 44, where Gaius explains that certain parts of the legal action make no sense without others. The "Condemnatio" must be preceded by the "Intentio" and this by the "Demonstratio", "for the Demonstratio without the Intentio and the Condemnatio, is of no effect." There are some parts that have sense alone, or that do not require other parts to be intelligible: "and in fact, sometimes the Intentio exists alone, as in prejudicial formulas, in which the question is whether a man is a freedman, or what the amount of a dowry may be, and numerous others."

[407] Another excellent partition of the contract appears in the French Civil Code, whose Book III, Title III, Chapter II: "Of Conditions essential to the Validity of Agreements", says, in its only article (1108):

> Four conditions are essential to the validity of an agreement:
>
> The consent of the party who binds himself;
>
> His capacity to contract;
>
> A certain object forming the matter of the contract;
>
> A lawful cause in the bond.

[408] See Gaius, *Institutes*, III, 93 and ss. and Peter Benson, "The unity of Contract Law," in (ed) Benson, Peter, *The Theory of Contract Law*, Cambridge University Press, Cambridge and New York, 2001, pp. 118-205.

social practices of buying and selling, letting and hiring and mandating someone to represent us in an affair. Both jurists are also saying that one party incurs an obligation as against another because he received a reciprocal obligation from the other.[409] However, Benson's juridical determination is superior in justice to Gaius' determination. In Gaius' legal piece, only the classified consensual contracts are enforceable.[410] If a plaintiff comes to the praetor with a case where he and the defendant agreed that he will look after the other's children and the other will paint his wall, the praetor will have no definition of contract with which to characterize the case (This atypical consensual contract, it goes without saying, does not appear in Gaius' list). Had the praetor had Benson's conceptualization, he would have had such an instrument. With the contract's parts at hand, the praetor can easily grant a contract action to the plaintiff. For, as the plaintiff reported it, the case is about an accepted offer of two reciprocal obligations. We see that in the Gaian list, two consensual contracts can receive unequal treatment. In Benson's determination, in contrast, all consensual contracts receive equal treatment.[411] The difference is due solely to the fact that Professor Benson used the conceptualization technique.

Concluding, legal concepts are optimal for practices like contract, tort, unjust enrichment, unilateral promise, testaments, practices that can take place in so many different ways that a case-by-case approach would never cover all the possible instances (see 2.4.3.2 and 3.3.4). For, once again, parceling a legal relation offers a set of elements through which the jurist can perceive, explain and govern every possible instance (or species) of the legal relation. With the contract's parts at hand you can look at every seemingly contractual behavior and ask, is that an offer? If yes, then ask again, was it accepted? If yes, then: does the acceptance contain a valid consideration? If yes, then you can conclude that there is a contractual obligation.

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[409] Benson's commitment to justice is well known. On Gaius' see Aldo Schiavone, *Ius. L'invenzione del diritto in Occidente*, Einadi, Torino, 2005, p. 126.

[410] Conf. Arrigo Dernburg, *Diritto delle obbligazioni*, 6°, Francesco Bernardino Cicala translation (?), Bocca, Torino, 1903, §7, 4, p. 24. Also Paul Jörs and Kunkel, Wolfgang, *Derecho privado romano*, 2d. ed., L. Prieto Castro translation, Labor, Barcelona, 1965, §117, 3, p. 271.

[411] Moreover, Benson's contract is a more efficient private law piece. Where the Roman lawyer must learn a long list of enforceable contracts, the common law lawyer must learn only how to use of a set of conceptual tools.

Can we have a just, peaceful law, that which comes about from justice without sword? The question seems to me interesting in two senses: direction one, do we need a sword to make the commandments of justice a fact? There are others, perhaps more effective modes of coercion. I am thinking of the coercion modes of morality, which are imposed by the very lawbreaker. Or, think of the external but non-physically violent modes of enforcing norms—reputation. The second direction of the question concerning the possibility of peaceful law is even more interesting. First, assume that there is a system of just laws, general statements about what to do in different scenarios that find justification in the rule of equal freedom (justice). Second, assume that people without exception comply with the norms of the peaceful law: they live in “the golden age”:

> Esiodo, ne Le Opere e i Giorni, racconta che all'inizio, nel periodo in cui regnava Crono, c'era una "razza d'oro". Gli uomini vivevano ancora come gli Dei: non invecchiavano e godevano la vita tra banchetti e feste. Giunto il tempo di morire si addormentavano dolcemente. Non dovevano lavorare ed i beni appartenevano a tutti. Vivevano dell'abbondante raccolto offerto dalla terra e non facevano guerre. Era il regno dell Giustizia e della Buona Fede, e gli Dei vivevano accanto ai mortalii. Giovenale affermava che un tempo "nessuno temeva ancora i ladri" e la gente viveva "senza chiudere l'orto". Ci si nutriva di legumi e di frutti, senza uccidere animali.

Do we need such thing as justice where its commandments shine in all of our actions? May be the role of justice in the golden age is figurative—sign of the reign of peace. Or may be she is there to be consulted of what to do in cases for which the law has not yet spoken. Whatever the case may be,

> … i misfatti dell'umanità misero in fuga Iustitia e la costrinsero a lasciare la terra, in cui viveva con familiarità coi Mortali, rifugiandosi in cielo dove divenne la costellazione della Vergine.

(Texts and images taken from: http://www.romanoimpero.com/2010/02/il-culto-di-iustitia.html)

(E) LEGAL PRINCIPLES

We must begin differentiating the principles of law from the principles of justice.[412] The principles of justice are analytical implications of the rule of equal freedom, like "independence from being bound by others to more than one can in turn bind them[,]"[413] which expresses in different words much the same as the pure rule of equal freedom. From this it follows that the principles of justice have no content; they talk about all legal relations, and at the same time address no specific legal relation (see Introductory Speech 1). In contrast, principles of law are about specific legal relations. They establish fundamental truths for specific legal relations. *Pacta sunt servanda* is one such principle. It orders the parties of a contract to do what they have promised to each other. *Pacta sunt servanda* is a fundamental truth of contract law in that there couldn't be contract law if *pacta sunt servanda* were false. Yet, there could be private law without *pacta sunt servanda*. One can certainly imagine a private law society where exchanges are made only manually. As the transaction emerged and died without leaving obligations, there is no need to order the parties to commit to their agreement. Principles of law are to their legal relations what the Pythagorean theorem is to a right-angled triangle; they are true to the figure with which they are concerned.

(F) ARE THERE RULES FOR DETERMINING LAW?

Of course there are. For example, every legal determination must have a practical implication. So, if I spend time talking about the right that the promisor has and wants to transfer to the promisee it is not because I find it useful to inform the reader about the constituents of the unilateral promise. It is because such determination would have practical implications. The most relevant one is that it is the mentioned right that a promisee would receive with the promise and claim in case of breach of promise.[414] The jurist is prone to indulge in the sweet bias of conceptual jurisprudence. She must remember, determining legal pieces is not about demonstrating one's ability to split hairs.

Another order of rules includes those that determine the appropriate use of a technique. For example, if one decides to elaborate a principle, a decision that should be rather

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[412] Italians distinguish "the principles of single institutions" from "the general principles of the system" See Norberto Bobbio, *Dalla struttura alla funzione: Nuovi studi di teoria del diritto*, Edizioni di Comunita, Milano, 1977, p. 259.

[413] Immanuel Kant, *The Metaphysics of Morals*, Mary J. Gregor translation, Cambridge University Press, Cambridge, 1996, 6:237-6:238, pp. 393-394.

[414] Another practical implication that emerges from the same determination is the possibility of right violation by a third party. See 5.2.1.2.(c)

extraordinary, one must be abstract enough so as to allow judicial discretion without giving room to plain arbitrariness. Or, if one decides to classify legal entities, one must classify them in accordance with the different ways in which the various entities manifest their common character or gender. For example, it would be a mistake to classify the contracts as real and consensual if one has defined contract as agreement with patrimonial content.[415] For saying that a contract is not concluded unless the plaintiff transfers the thing she agreed to transfer to the defendant amounts to saying that contract is more than agreement with patrimonial content or that the "real contract" is not actually a contract. The jurist may still want to give legal reality to the practices known as real contracts. But then she must either change the definition of contract (she still wants to classify those practices as a contract!) or rather classify them as something other than contractual transactions. This must be considered if the idea of classification is taken seriously.

The typical definitional mistake occurs where definitions contain the definiendum. For example, "A promise is a promise made by…" You are not really defining! A definition would also be biased where the definition is excessively ample or excessively narrow. We saw in Part 3 that from the perspective of justice, the definition of promise is biased due to excess. A common mistake in conceptualizations is to treat accidental elements as essentials. I would commit this mistake for example, if I said that the obligation of unilateral promises is conditional. True, the obligation of the promise of a reward and the promise of a prize is conditional. Yet, the obligations of other unilateral promises are not conditional but potestative (i.e. promise of a contract) or pure and simple (i.e. fake gratuitous promises), see 5.2.2.2 (c). Saying that the obligations of unilateral promises are conditional would exclude the promise of a contract and fake gratuitous promise from the law of unilateral promises.

(G) THE PRIVATE LAW LANGUAGE

Three points on the use of language: First of all, new ideas must be presented with new words. Why? Well, important legal concepts are generally tied to a word; if we want to talk about contract we do not say other than "contract." If we use an occupied word for

[415] Real contracts are defined in opposition to consensual contracts. "The contracts are consensual or real. The consensual contracts, notwithstanding what it will be established in relation to their form, are concluded for producing their proper effects from the moment that the parties have reciprocally manifested their consent." 1871 Argentinian Civil Code, art 1140. "The real contracts, for producing their proper effects, are concluded from the moment that one of the parties have made conveyance [tradición] of the thing which the contract is about." *Idem*, art 1141 "Form the class of the real contracts the loan for consumption, the loan for use, the contract of deposit and the constitution of surety and of anticresis." *Idem*, art. 1142.

talking about a new concept, we create the possibility that the reader, in a moment of distraction, will think of a concept other than the one we intend to invoke. We want to prevent such confusion.

Secondly, in labeling a new concept we must choose private law words. What? Yes, private law words.[416] Ask yourself this question: What most immediately tells you that what you are facing is a piece of private law? Take this legal monstrosity: "The person who makes a contract with a thing will be free to perform it unless a third party requires it." This legal statement makes no sense, juridically speaking. However, it predisposed you to interpret it as a juridical piece. Didn't it? Why?! Because it used words that are traditionally associated with private law discourse.

You should present your construction with legal words because you wish for your concept to be quickly interpreted in the manner intended.[417] Another reason for using legal words is that you do not want to clutter your discourse with awkward sounds. What do I mean? Let me illustrate: "An obligation is a legal relation by which a private agent has a duty to give or do something at the request of another." There is one thing awkward in this statement. The awkward thing is the use of the words "private agent". Even if "private agent" will be taken to mean more or less what I want to say, "private agent" are not legal words. The same can be said of "goods"/"thing" and "bargain"/"contract," the examples could be multiplied.

Now, we must present concepts with legal words but we must avoid using extant legal words. What legal word do we use then? Two possibilities. The first one is to recycle. You utilize a legal word whose latest concept is no longer vital in your law. For example, the word "pollicitatio," originally from Roman law, absent in the common law, and translatable into "policitation" could be linked to a type of public solicitation. The law of property is full of words attached to obsolete concepts. The other possibility is to invent. How can we invent a word that sounds legal? This is something that I cannot really tell. But I will give you an example: Have you ever heard of the "right of disposable freedom?" Most probably you haven't. Yet, these words sound legal, don't they? The key is probably to use Latin rooted words. You will see many examples in Part 5.[418]

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[416] I take the term "law words" from Albert Kocourek, *Jural Relations*, MacMillan, Indianapolis, 1927, p. 25.

[417] See Introductory Part.4.3.

[418] Here you have an example of a nice choice of words:

> While there are numerous other instances of the apt use of the term "liberty," both in juridical opinions and in coveyancing documents, it is by no means so common or definite a word as "privilege." The former term is far more likely to be used in the sense of physical or personal freedom (*i.e.*, absence of *physical* restraint), as distinguished from a legal relation; and very frequently there is the connotation of *general* political liberty, as

4.3.2.5. BE AN ARTIST WHEN IT IS DUE

We generally do not have to determine every single part of the construction. We will see that some juridical aspects of the interested promise appear to us in the form of existing legal concepts. For example, that one person states to want to commit herself to do something at the request of another is explainable and governable with the concept of voluntary obligation. I am now tempted to say that something of the new reality must show the form of an existing legal concept; for otherwise the reality would have never caught our attention!

Still, the time for determining legal concepts will come. It is evident that the seeming cause or reciprocation of the voluntary obligation—the chance that the promisee does what the promisor wants—hardly fits an existing legal form. We may recall the contracts that are about an obligation for a chance.[419] But we must resist closing circles with fictions! The chance that could be involved in a contract is actually wrapped up in the obligation that a party either offered or accepted. Closing the circle with a fiction would be implying an acceptance of the promise, which we do not want to do (2.2). We must give legal reality to the chance with creatively! We try to explain the chance-creation fact in a manner that makes it clear that, with the reception of the promise, a new subjective right goes from the promisee to the promisor.

4.3.3. THE INTERESTED PROMISE APPEARS TO BE A PREFABRICATED CAUSE OF OBLIGATION

I now begin my construction. These lines of argument will be dedicated to preparing the reality called interested promise, so that I can determine it in its best possible legal representation. We are not determining a private-law concept yet. I am beginning to mould, as it were, what will be determined in part 5.

4.3.3.1. CHARACTERIZATION: A VOLUNTARY CAUSE OF OBLIGATION

What is the juridical nature of the interested promise? As we are told, the point of a promise of a reward, prize or contract is to induce confidence on the part of the promisees so that they will consider looking for the lost thing, engage in the challenge or ponder the

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> distinguished form a particular relation between two definite individuals. Besides all this, the term "privilege" has the advantage of giving us, as a variable, the adjective "privileged". Thus, it is frequently convenient to speak of a privileged act, a privileged transaction, a privileged conveyance, etc.
>
> Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," in *The Yale Law Journal*, Vol 23, No 1, (1913), pp. 16-59, at PP. 42-43 (quotes omitted and italics in the text.) The final justification is hilarious.

[419] See 4.3.3.2(f.1.)

contract proposal. Interested promisors make these promises because the promisees who receive them enhance the chance that they will get something they want—a lost thing, a nice challenge, a sale, etc. (see 1.1.3.) It is obvious that, if the interested promise qualifies as a legal concept, it qualifies as a voluntary cause of obligation, a commutation of an obligation for the so-called "value of a chance" (see 1.3).

So we have to approach the interested promise from the perspective of the high-concept of voluntary cause of obligation. The interested promise must be explained as a commutative transfer of rights (see 4.1.3-4). A series of questions then emerge: What is the thing that the promisor owns and then transfers to the promisee? How does she transfer that thing to the promisee? Does the promisee acquire that thing? How? How is it that the promisee creates a chance for the promisor? Does the appointed promisee always create the sought-for chance? And, finally, how does the promisor acquire the created chance?

(A) THERE IS ONE PERSON: THE PROMISOR

If the persons of the contract inter absents are the "offeror" and "acceptor" (see 4.1.3.1), who are the persons of the interested promise? Even if we visualise the entire relationship, we focus firstly on one person. The person who initiates something, who with the participation of a second person will culminate an interested promise, is the "interested promisor." I will refer to her simply as the promisor.

(B) SHE, WITH A SUBJECTIVE RIGHT OVER A THING: A PERFORMANCE TO OBLIGATE

The promisor wants to make a promise. She, in the words of a high private-law concept, wants to dispose of a right. What is the thing that the promisor owns and wants to transfer to the promisee? We can say that the promisor appears as owner of an amount of disposable freedom, which she will specify in a performance and transfer as an obligation to the promisee. (See 4.1.3.2 and 5.2.1).

The classical theory of the obligation is perfectly suited to explaining what promisors want to give in the case of the typical interested promises. For example, the interest of the person who makes a promise of a contract is that the promisee acquires an irrevocable option to make a contract. We can say that the promisor transfers a "potestative obligation" to the promisee. An obligation is potestative when its exigibility depends on a dispositional act of the creditor. The creditor cannot claim performance unless he has previously declared to the debtor his will to accrue the owed performance. Meanwhile, the debtor owes the giving, doing or not doing to the creditor; applied to our case, the

promisor cannot act as if she had never promised to make (do) a contract to the promisee. We will see more examples in 5.2.2.

(C) HER ACT AFFECTS ANOTHER'S SPHERE OF RIGHT: THE PROMISEE DISPOSES WHAT THE PROMISEE ACQUIRES?

The promisor specifies the obligation as she wishes and gives it to the promisee by means of a promise. The act of "promise" is the means by which the promisor *ex hypothesi* transfers the obligation to the promisee. But is it?

(C.1) A SENSIBLE ISSUE: CAN A PROMISEE ACQUIRE WITHOUT ACCEPTING?

Jurists developing theories of contract have long maintained that transfers of rights need acceptance to be perfect. This, despite the fact that, since the times of the jurist Paulus, private laws have been enforcing promises that were revoked before the acceptance.[420] However, these jurists are authorities (I am talking about Grotius, Pufendorf and most recently Pothier) and proffer reasonable arguments. So the question must be asked: Is promise apt to transfer rights? Is it just to say that someone can acquire a right without either requesting it or accepting it? In answering these questions we must forget about contract. We look at promise from the perspective of high-private law concepts. Promise must appear as an interaction between two persons and it must be clear that the interaction is affecting the two parties' spheres of rights (see 4.1.3.3). More specifically, the promisor must appear as someone who disposes part of her freedom and the promisee as someone who acquires the disposed freedom as a credit right (see 4.1.4). I will build promise as a private law interaction in 5.2-3, and justify my construction in 6.1.

(D) THERE IS ANOTHER PERSON: THE PROMISEE

Let us assume that the promise transfers the obligation to the promisee or that the promisee has a legal basis to think that he has acquired a right directly from the promisor. We get to the other person of the relation. We call him the "interested promisee," or if no contrary specification is made, simply "promisee".

(D.1.) THE SOLID BUT RARE POSITION OF THE PROMISEE

But what can the promisee do with his "promissory right?" Suppose the promisor neglects the promise. The promisee will go to a court, supporting her claim to her promissory right not only with the promise. The promisor did not transfer a right charitably. She

[420] See Digest, 50,12 *De pollicitationibus* (a clear case of interested promise.)

transferred a right because she knew that the promisee's reception of the right would induce him to produce a benefit for her. The promisee will bring socioeconomic studies in support of his claim: Promisors make interested promises to obtain the "value of the chance."[421] What is more, the promisee will be able to support his case with legal decisions: Private law dictums that have recognized such chances as "ample consideration for the promise."[422] It is as if private law had seen these chances as advantages passing from the promisee to the promisor and, in a fashion comparable with other cases (see 4.1.4.3 (b)), it utilizes these advantages to render the promissory rights enforceable.

These arguments, especially the last one, sound convincing. But as scientists we cannot content ourselves with rare decisions. We want to give conceptual form to the so-called "value of the chance." If the transfer going from the promisor to the promisee is a difficult one, the reciprocal is even more so. But we must try.

(D.2.) CHANCE AS THE OBJECT OF OBLIGATIONS, BUT NO OBLIGATION-CREATING ACT BY THE PROMISEE

It would be easy to characterize the chance if, for example, the promisee promised the chance to the promisor. Private law knows of commutations where one party assures a certain result to another while the other only assures a chance. This occurs where A assures a payment to B and B assures a prize to A in the event that A wins a competition. B has received money and A has received a chance. Gambling contracts follow the same

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[421] Melvin A. Eisenberg, "Probability and Chance in Contract Law," UCLA L. Rev., 45, (1997-1998), pp. 1005-1076, at p. 1007.

[422] The statement belongs to A. L. Smith, L. J. in *Carlil vs. Carballic Smoke Ball*. The task for the judge was to show that the defendant gave valid consideration for the public promise of a reward to the user of a medicine (smoke balls) who couldn't benefit from its curative effects. One consideration was found in the fact that the plaintiff used the smoke balls without benefitting from its curative effects but "the other more important consideration is the money gain likely to accrue to the defendants by the enhanced sale of the smoke balls, by reason of the plaintiff's user of them." True, the judge pinned the consideration to "the plaintiff's user of" the medicine. In my view he did that because the doctrine of consideration requires some deed on behalf of the party who gives the consideration. But it is obvious that what caused sales to increase was not the usage of the Smoke Balls but the chance (or "the money gain *likely* to accrue") that promisees created when they received the promissory advertisement. The same argument can be read in Lindley, L. J. opinion:

> It has been argued that this is nudum pactum—that there is no consideration. We must apply to that argument the usual legal tests. Let us see whether there is no advantage to the defendants. It is said that the use of the ball is no advantage to them, and that what benefits them is the sale; and the case is put that a lot of these balls might be stolen, and that it would be no advantage to the defendants if the thief or other people used them. The answer to that, I think, is as follows. It is quite obvious that in the view of the advertisers a sue by the public of their remedy, if they can only get the public to have confidence enough to use it, will react and produce a sale which is directly beneficial to them. Therefore, the advertisers get out of the use an advantage which is enough to constitute a consideration.

For a more recent decision see 2.2.1.

pattern. But nothing like this occurs in interested promises. Had the promisee *promised* the promisor to search for the dog, there would be no issue with the characterization of the chance. The truth is that the promisee does not even talk to the promisor when he ex hypothesi creates the chance.

(D.3.) CHANCE AS OBJECT OF AN IN REM RIGHT?

We can approach our research with another question. What is the value that the debtor receives in a unilateral contract? In some cases the answer is easy. I offer you money so that you build a wall in my garden. You build the wall; I have an *in rem* right over the wall. But what about these cases: X offers to give $Y to anyone who provides information leading to the discovery Y's murderer, or to anyone who crosses the Brooklyn Bridge. What sort of right does the offeror acquire when the offeree performs the condition? The offeree must appear as someone who providing a value for the obligation he is acquiring because he otherwise cannot claim commutation. Recall, justice ensures the enforcement of voluntary obligations only where the creditor has acquired a subjective right in the obligation-creating act. Our best option is to say that the acceptor gave an *in rem* right over her time and efforts to the offeror. The offeror acquired such a right when the offeree produced the requested information or crossed the Brooklyn Bridge.

Could we build an analogy here?

If the offeree of a unilateral contract gives "property" over his time and efforts to the offeror, we could say, the promisee gives "property" over the chance she produces to the promisor. The analogy, however, has its limits. When the offeree crosses the Brooklyn Bridge, the offeree gives "property" over something that gets consumed with its coming into being. As the offeree's efforts pass into the belonging of the offeror, they disappear. In the case of the interested promise, by contrast, the chance remains alive after the promisee creates it. The life of the chance lasts from the moment that the promisee receives the promise to the moment that the promisee either claims or rejects the promissory right. The issue with characterizing the benefit of the chance as a sort of *in rem* right of the promisor would not be the fact that the chance is an intellectual thing. The problem is another, rarer issue. It has to do with the fact that the promisee can liberate the promisor. By letting the promisor know that he is no longer interested in the promise the promisee is at the same time dousing the chance that he may do the thing that the promisor wants. Thinking of the chance acquisition as a *ius in rem* acquisition is impossible for this reason—the promisor cannot be represented as owning something that the promisee can licitly destroy.

Yet dominium over things is not the only right in rem. We could own the same thing without being co-owners. How? By owning different powers over the same thing. One could think of the chance as something that the promisee creates, and is able to destroy, but that in fact serves the interest of another.

(E) HE, WITH A SUBJECTIVE RIGHT OVER A THING: A MODE OF REASONING IN HIS MIND?

Think of the interested promise this way: Promisors do not make promises to random persons. They address persons who could be interested in their promises, persons who will take the promissory right and evaluate it as a possible claim. Now let me ask this question, is there anything that the promisee could be said to be affecting or using when he receives the promise? We certainly cannot say that the promisee affects his own possibilities for future performance. Yet we can say that he is using something of his own. The reception of the promise by the promisee makes him *think*, evaluate the promised proposal as a possible thing he might do. What the promisee owns, the thing that will be affected with the reception of the promise, is his thinking. He is, let us put it this way, owner of the thinking that produces the chance. (Please see 5.4.1).

(F) THE INTERACTION IS NOT A SIMPLE INTERACTION: THE PROMISEE CREATES A CHANCE FOR THE PROMISOR

The promisee receives the promise and realises that he has a new legal possibility of action. He may be uninterested in this option at the moment of the acquisition. But he knows he has it. The fact that he may have the occasion to remember the option is the possibility that the promisor wanted cause with her promise. In precisely what is this phenomenon relevant for private law? There are two critical facts to consider.

Firstly, the chance affects the life of the promisee. The promisee has choices other than the one he acquired with the reception of the promise. These choices are surely incompatible and possibly contradictory. His right to gain a reward by finding a lost thing is surely incompatible with his right to rest at home; choosing the promised option and choosing Silvia's offer of the same service are alternative choices. The promissory right competes with other choices of the promisee. If the promissorily created choice is effective enough to convince the promisee to reject other choices by choosing it, then the promisee will in some sense have chosen what the promisor wanted (see 5.4.2). This is relevant enough so as to regulate the relation legally. The best possible regulation is the one envisioned in this work (see 6.2).

Equally important, the creation of the chance benefits the promisor. The promisor wants something she cannot buy. There is no market where she can find her lost dog, nor is it

possible to buy the choice of potential partners or clients. The best she can do is seduce them with irresistable proposals. Hence, she tailors proposals to selected candidates. Candidates take the proposal and evaluate it as a choice for action, creating the chance that they will happen to choose it. The creation of this chance is what the promisor wanted to have caused with her promise. We see that the promisee is using her thinking to produce, as it were, "a fruit" for the promisor.

(G) THE INTERACTION AFFECTS HIS AND HER SPHERE OF RIGHT: THE PROMISOR PERCEIVES THE CHANCE??

The idea I had in mind since the beginning of 4.3.3.2 (e) is the concept of *ius in re aliena.*[423] The promisee posseses what I will call "a bargaining mode of reasoning." This is the know-how with which the promisee evaluates the promise. The *re aliena* is the chance, an externality that the promisee produces when he uses his bargaining mode of reasoning. It is the possibility that he may happen to choose the choice promised instead of other choices of his own. The promisor enjoys the chance as someone who enjoys the externalities of the thing of another. And so, I dare to say, the promisor owns the chance as someone who owns the fruit of the thing of another.

But why is it that the promisor is owner, in the sense of having title over the chance? The answer to this question is strictly linked to what made the promisee cause a benefit for the promisor: the fact that the promisee received a promise, or acquired a credit right. In other words, it is the chance that the promisee will present as the counter-cause of her promissory right. It is this chance that the promisee will oppose to the promisor if the promisor wants to revoke the promise.[424] The promisee will say, "When you made me the promise, you made me use my bargaining mode of reasoning. I used it because of your proposal and applied it to the right of your proposal. I could have not used it or have

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[423] Briefly defined, a *ius in re aliena* is a power to do something with the thing of another. For example, Peter has a power to take a reasonable monthly amount of oranges from a tree that belongs to Dennis.

Of all the real rights, it is probably in the *in re alien*a rights that the axiom "ius et obligatio correlata sunt" manifests itself more starkly. In our example, Dennis cannot prevent Peter from taking fruit from his tree. The difference with personal rights is that the right is not over the performance of the duty bearer. The right of Peter is not that Dennis does something so that Peter can take the fruits. The right is that Dennis does not oppose Peter taking the fruits and, moreover, if Dennis sells the land where the tree is to Hans, Hans also bears the duty to Peter.

Professor Gretton thinks that "limited real rights" "is perhaps the commonest expression internationally." But he also teaches that "Ius in re aliena" is an alternative, especially in the Francophone world, where its French equivalent, "droit reel sur la chose d'autrui", is also used. George Gretton, "Ownership and its Objects," in *RabelsZ Bd.*, 71, (2007), pp. 802-851, at p. 811, note 45.

[424] I will argue in 5.6.3.2.2 that the right over the chance also has implications as against third parties.

applied it to another cause. The fact is that my use of my bargaining mode of reasoning produced a chance. This chance was a benefit for you, for it is this chance that you sought with your promise. You have perceived this chance as a fruit of yours, for you are the direct beneficiary of the possibility I have created" (Please see 5.4.2 and 5.5.2).

Therefore:

(H) A VOLUNTARY OBLIGATION (CREDIT RIGHT) ARISES FOR THE PROMISEE

The promisor is obligated to do what she promised from the moment that the promisee receives the interested promise. The promisee has the correlative right to demand that the promisor act in accordance with the promise. This amounts to saying that the promisor cannot neglect the promise by, for example, intending to revoke it and that the promisee can count on the assurance that what the promise said will be the case (See 5.6.2).

At the same time, the promisee can say to the promisor:

Of course I cannot deprive you of your right to the chance. But I can restart, as it were, the thinking from which the chance emerges. I can end a cycle of my bargaining mode of reasoning, which is mine, not yours. So, when I liberate you from your obligation I dispose of nothing of yours; if at all, I am just ending a cycle of my bargaining mode of reasoning (Please see 5.6.4).

Now it is time to elaborate these, and other points extensively (I am sorry).

5. A PROPOSAL: THE UNILATERAL PROMISE AS A NEW CAUSE OF OBLIGATION

5.1. THE (JURIDICAL) UNILATERAL PROMISE

In this part I will elaborate the interested promise as a new cause of obligation. I want to use the first section to give an overview of the concept of unilateral promise. In the following section I will outline the presuppositions, elements, object and outcome of the unilateral promise. I conclude by showing that the concept of unilateral promise fits with the contract, tort and unjust enrichment.

5.1.1. PRESENTATION

The *unilateral promise* involves two persons, the *promisor* and the *promisee*. The promisor is a person who owns an amount of *disposable freedom* and promises a part of it to the promisee. The promisee is the person who receives the promised performance, and as he posseses a *bargaining mode of reasoning*, compares the right with his preexisting alternative choices, creating a chance for the promisor. A unilateral promise is formed when the promisor makes a *promise*, the promisee *receives* the promise, the reception of the promise induces the promisee to *cause a chance* and the promisor *perceives the benefit* of the chance. The object of a unilateral promise is a legal exchange or commutation. On the one hand, the promisor disposes of a performance of her so that the promisee acquires it, and on the other hand, the promisee uses his bargaining mode of reasoning to produce the chance that the promisor enjoys.

The unilateral promise establishes a *promissory relationship*, by which the promisor enjoys the chance produced by the promisee and the promisee counts on the performance the promisor promised. The promisee hence appears as the owner of a promised performance. Nonperformance of a *promissory right* occurs, for example, where the promisor neglects the promise or initiates actions that will hinder the performance. The promisee can demand that the promisor recognize his entitlement and act as if the promisor never neglected the promise or, if it makes no sense to consider the performance performable, he can demand compensation for his frustrated expectations. The promisor, on the other hand, is the owner of the benefit of the chance. Violation of the *right over the benefit of the chance* occurs where someone takes the chance without the promisor's authorization. The promisor can demand compensation for the value of the frustrated chance. The form of a right to enjoy a chance also serves as a shield for defendants who were falsely accused of making a unilateral promise. This would typically

occur where the promisor made a bare promise or an offer with typically promissory content.

The promissory relationship can be extinguished in various ways, the most significant of which is the *liberation of the promisor*. The liberation of the promisor by the promisee does not imply a violation of the right of the promisor. If the chance and its benefit disappear with the liberation it is not because the promisee seized the benefit of the promisor but because the promisee completed a cycle of her bargaining mode of reasoning.

5.1.2. A GUIDE TO THE READER

The next four sections determine the requirements for the formation of a unilateral promise. Section 2 determines the first requirement, namely, the making of a promise. What does being a promisor require? (2.1.1) What is the process of ideating a promissory right? (2.1.2) What must the promisor do to effectively dispose of the promissory right? (2.1.3) Section 3 determines the second requirement, namely, the reception of the promise. What does being a promisee require? (3.1.1) How is it that the promisee *receives* the right? (3.1.2) Answering the latter question will structure the discussion in 3.1.3. The question is whether promise needs acceptance to transfer rights.

In the first two sections the first transfer of the commutation will have been explicated. We know now that the promisee acquires a credit or promissory right from the promisor. Section 4 and 5 will explain that the reception of the right by the promisee induces the promisee to cause a benefit that the promisor rightfully perceives. These sections, in other words, determine the other part of the commutation.

Section 4 determines the third step in the formation of a unilateral promise, namely, the creation of the chance. What is the thing with which the promisee produces the chance? (5.4.1) How is it that the promisee produces the chance? (5.4.2) What kind of thing is the chance? Of particular interest, is the chance an *in commercium* thing? (5.4.3) Section 5 determines the last requirement, namely, the perception of the benefit. How does the promisor perceive the benefit of the chance? (5.5.1) In what sense does the promisor own the benefit of the chance? (5.5.2) And finally, why is it that the promisor *owns* the benefit of the chance? (5.5.2)

Section 6 develops the practical implications of the promissory relation. What can the promisee claim of the promisor? (5.6.2.1) What can cause the extinction of his right? (5.6.2.2) On the other hand, has the promisor any claim by virtue of her right over the

benefit of the chance? (5.6.3) Finally, does the liberation of the promisor imply a violation of the promisor's right? (5.6.4)

Section 7 perfects the construction of the new cause of obligation. Firstly, it places the unilateral promise in a classification of causes of obligation (5.7.1), and secondly it sheds light on the differences between unilateral promise and contract (5.7.2)

5.2. Requirement one: The promisor must *make a promise*

5.2.1. The promisor must own the performance she wants to obligate

5.2.1.1. The promisor must be a capable person

I lost my dog and feel the strong desire to have it back. My desire is to have my lost dog back. I imagine that doing something may help satisfy my desire. I could do many things, from crying and complaining to making a public promise of a reward. The last choice supposes a more mature attitude. I repressed my most immediate inclinations, thought of the various ways that, according to my experience, may aid in the satisfaction of my desire, chose one of those means and planned and carried out my chosen action. That I made a unilateral promise supposes that I have legal capacity.[425]

Legal capacity on the part of the promisor is a requirement for the formation of the promise. The person who makes the promise must appear to the promisee as someone who can be the author of such act, someone who could tell what the implications of promise in private law are. A minor, a mentally ill or a capable person who temporally lost awareness of her capacities, like a very drunk capable person, cannot be taken as a promisor. These are persons who wouldn't be able to respond for the things they did. They cannot be said to intend what comes with promise before making "one" and so they cannot be held to do what they said.

(a) Trusting the promise of an obviously incapable person

Someone who can tell that the "promise" is coming from an incapable person cannot take the "promise" as a promise. For what he is receiving is not a promise; or, in private law vocabulary, it is a null promise. So the plaintiff who found and returned the lost thing cannot claim expectation on the basis of a null promise of a reward. His expectations were illegitimate. He had no legitimate basis to create expectations because he knew, or should have known that everything he heard from the apparent promisor was, as it were, not

[425] See the discussion in 4.1.3.1.

coming from her mouth. Something else, like an unmanageable inclination, or background voice, was promising for her. So, such "promises" do not count as promises. Yet the plaintiff can claim restitution. He will have to prove that the costs he incurred in returning the lost thing where somehow useful for the incapable person.

5.2.1.2. THE PROMISOR MUST OWN THE PERFORMANCE SHE WANTS TO OBLIGATE

But self-determination is not enough. The autonomous being must have endorsed the private law regime and addressed the promisee as a participant of the same private law.[426] So on the basis of the determinations I have made in Part 4, what sort of right should the promisor have to be able to make a unilateral promise? The promisor must own the performance she wants to transfer to the promisee. Put differently, she must come to the transaction with a right over an amount of disposable freedom.

Imagine a carpenter making a promise. Every reasonable promisee could think of her as able to craft shelves, chairs, desks, and in general whatever qualifies as an act of carpentry. These assumptions are not about present facts, but about a carpenter's future agencies. Now imagine that our carpenter promises to furnish Jose's new office. Of the universe of things that Jose could have reasonably expected the carpenter to do, the carpenter determined, parceled, as it were, a particular choice and transferred it to him. When I say that the promisor has a right over her disposable freedom I mean to say that, before the act where she parceled and gave a piece of her freedom to the promisee, she was free of an obligation to fulfill the given performance. She could have decided to spend the time that furnishing Jose's office would consume doing something else, like furnishing her own office, or selling the service to a third person. This performance was optional to her (she was free to do it) because it belonged to her—it was part of her freedom. It could have been the case that the agency no longer belonged to her—it was no longer part of her disposable freedom. This is the case addressed in 5.2.1.2 (a) and (b). Or it could have been that the promised agency has never belonged to her. These are cases of illicit or impossible promises, where someone promises something she cannot legally do (something that has never been within her disposable freedom) or someone promises something that no reasonable person could expect her to do (something that could have never been within her disposable freedom). We will deal with these cases in 5.2.2.2(c4)

[426] It is important to mention that I am not dealing with the case where the parties have previously agreed that one will obligate herself unilaterally whenever she makes a promise to the other. We are dealing with the case where two relative estrangers meet each other through a promise.

(A) Promising something already promised

The promisor must have owned the freedom she determined and transferred as an obligated performance. The performance would not have belonged to the promisor if, excuse the triviality, the promisor had already transferred it to the promisee. For example, a subcontractor forgot that she has already submitted a promise of a service in response to the general contractor's solicitation and submits a second one. As the second promise is about a service that could not be reasonably done in tandem with the service promised the first time, the second proposal is void for lack of object. The promisor was no longer the owner of the performance she is promising and the promisee had grounds to know it.

(B) Promising something promised to another

Another, probably more sensitive case is where the promisor promises a performance that she has already promised to a third party. The effects of the unilateral promise will depend on whether the promisee knew that the promisor had already obligated the performance or not. If he knew it, then he cannot claim the performance as his. The promise in this case is absolutely void for lack of object. If the promisor cannot prove that the promisee could tell that the performance had been given to another, then the promisee has a promissory claim. As we are talking about a case where the promisor cannot actually do what she has promised—for otherwise the performance would not belong to a third party—the promisee is entitled only to the frustrated expectations.

(C) Having one's credit harmed

Our right over our disposable freedom could be violated by the deeds of another. For example, a consumer association launches a defamatory campaign whereby it is stated that Company X makes promises that it does not perform. If the campaign is unfounded, then it is clear that the consumer association is harming Company's X credit. Company X can go to court and say that the freedom it carefully conserved so as to make promises has been damaged and that it wants compensation for the harms that the defendant wrongly caused to its credit (or, as I call it, disposable freedom).

5.2.2. THE PROMISOR IDEATES AN OBLIGATION WITH A VIEW TO ACQUIRING A CHANCE

5.2.2.1. THE PROMISOR'S IDEA: OBLIGATE A PERFORMANCE FOR ACQUIRING A CHANCE

The preliminary stage in the making of a unilateral promise is the intention, or, as I like to call it, ideation of a promissory obligation. To ideate an obligation, the promisor must obviously know what a voluntary obligation is.[427] Private law conceptualizes obligation as a duty of one person to another. The obligation is voluntary when the debtor of the obligation has determined the content of the duty. It is as if private law gave private actors the possibility of determining its content. But not all interests are served. Private law recognizes voluntary obligations only insofar as they have been determined to have been exchanged. This is true to the extent that juridical private law requires that persons be clear about the thing they seek to obtain with the obligations they create. [428] For the sake of safeguarding such clarity, just private law offers a classification of the voluntary obligations that divides them in accordance with the interest that a debtor could seek to obtain.

There are four voluntary obligations, in the same way that there are four interests. Firstly, a person may be interested in honoring a past favor or an unenforceable debt and have no means to do so in the present. With an obligation *solvendi causa*, a person can obligate a future performance of hers with a view to compensating something she long ago received. Secondly, a person may be interested in acquiring a thing or service in the

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[427] Ideas of transactions that are typically recognized by the law would be written in the language and forms in which they typically appear. This formality is often followed so as to ensure that the court recognizes the transaction. When the parties have atypical ideas, they will try to find a key typical term, relation or formulary that they could add or make their transaction conform to. They would try to make it so that the court validates the whole transaction by consideration of the typical term, relation or formulary. See Max Weber, *Economy and Society*, Guether Roth and Claus Wittich editors, vol. 2, University of California Press, Berkeley and Los Angeles, 1978, pp. 743-756.

[428] This is the reason why the French Civil Code wrote, "An obligation without causa, or with a false causa, or with an illicit causa, cannot have any effect." (Art. 1131.) Other private laws, like the German, recognize the exchange function of voluntary obligations only implicitly. The BGB does not state that obligations obligate only when they were created in the context of an exchange, but its structure (see the argument in 4.1.2.3 and 4.1.1.1(e)), its law of unjust enrichment and the fact that the Code does not enforce gratuitous informal agreements suggests so. The BGB does not talk about causa or consideration because its law of contract is a reflection of the pandectists' theory of contract, and these authors neglected the concept of causa and consideration. They derived the contractual obligation from the creative force of individual wills (See Paolo Recano, "Profili storici della promessa unilaterale," in *Rassegna di Diritto Civile*, (2006), fasc. 1, pp. 168-223, at p. 201 note 101). Recent American theorists have elaborated similar theories, like Charles Fried, who grounds the obligation of contract on a promissory principle, according to which it is wrong to make a promise and break it, and dismisses the doctrine of consideration owing to its uselessness. He argues however, with great ingenuity, that promises do not bind without acceptance. *Contract as Promise: A Theory of Contractual Obligation*, Harvard University Press, Cambridge (Mass) and London (Eng), 1981, Chapters 1-4.

present and have no means of paying for it. With an obligation *credendi causa*, a person can obligate a future performance of hers with a view to changing it for the thing or service she wants. Thirdly, a person may be interested in acquiring something in the future and have no means or will to pay for it now. With a *synalagmatic obligation*, a person can obligate a future performance of hers with a view to changing it for a *credendi causa* obligation.[429] Finally, a person may be interested in acquiring a future service or thing, the existence of which is uncertain, and so try to obtain a chance that she acquire it. Romans called these obligations "contracts of *spes*" (spes, in Latin, hope), for what the debtor receives in exchange of her obligation is neither a thing, service nor a credit, but a mere hope. [430]

So with a voluntary obligation we can parcel a part of our future and render it valuable by exchanging it for something else—past, present, future, and probable. The interested promisor, who knows of the concept of voluntary obligation, will utilize the voluntary obligation to pursue her special interest. But what is her interest? What kind of thing does she want in exchange for her obligation? The answer is obvious, but let me analyze the reasoning through which the interested promisor reaches the decision to change an obligation for the value of a chance.

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[429] The *synalagmatic obligation* is a *credendi causa* obligation whose cause or raison d'être is another obligation of the same type. It is used to ideate purely executory contracts, where one party obligates reciprocally to the other.

[430] "The sale of a non-existent thing which may come into existence is however, as we have seen, perfectly valid. Such a sale is known as the sale of a *"spes"* or *"res sperata"*. The distinction between the two is of little practical importance. A *spes* is a mere hope that something will be available for delivery by the seller, depending purely upon chance. A *res sperata* on the other hand, is something which, although not yet in existence, can confidently be expected to come into existence in the normal course of things." J.T.R. Gibson, *South African Mercantile and Company Law*, 7th Edition, Kenwyn, Juta, 1997, at p. 119.

One may be suspicious of the uncertainty of the promissor's benefit, or, to put it differently, of the difuse character of the promissory right's counter-cause. Yet one can find counter-causes with the same sort of uncertainty in the positive law too, not to mention the fact that we overvalue certainty in law:

> Ciò che noi siamo soliti chiamare "certezza del diritto" è una "verità" che ci proviene dal seno profondo della modernità giuridica, una "verità" [o mito] in cui parecchie generazioni di giuristi - dagli adepti settecenteschi del credo illuministico ai sacerdoti otto/novecenteschi del culto della legge - hanno convintamente creduto, tanto da proporla come una acme di civiltà giuridica, ineguagliabile e, pertanto, insopprimibile. [...Per quello] se c'é una forca caudina di carattere culturale e tecnico di cui dobbiamo sbarazzarci, è la netta antìtesi certo/incerto, certezza/incertezza, inculcàtaci pressantemente e restata nel cuore - più che nell'intelletto razionale - di noi giuristi italiani.

Paolo Grossi, "Sulla odierna "incertezza" del diritto," in *Giustizia Civile*, n. 4, (2014), at p. 923 (quotes ommited).

(A) HOW DO PROMISORS ARRIVE AT THIS IDEA?

Someone loses something and wants that thing back. Her interest is to have the lost thing back. She knows that it is possible that someone will find the lost thing, learn that it belongs to her and return it without expecting more than a "thank you very much." Though this possibility exists, she believes it is highly improbable. She thinks that she can do something to make it more likely she will get her thing back. The best possible world for her would be one where there is a place where she can buy the thing she lost, but there is no such market. Still, she could ideate a synalagmatic obligation. She could offer a monthly payment to a private detective for the correlative obligation that the detective looks for the lost thing, but she finds this idea inconvenient. She is obligating herself to pay money to someone who is obligating himself only to try to find the thing, not to return it. Other means could give her the same thing, like offering a unilateral contract to the public, an offer by which anyone of the public who returns the lost dog is entitled to claim a sum. True, no one from the public will commit to look for the lost thing. But she is not obligating herself to pay a monthly wage neither. What is more, the fact that no one will commit to look for the lost thing may be compensated by the fact that many—not only the private detective—will know of the offer. Maybe someone found the lost thing by chance and has ignored the person to whom it belongs, or wants to return it only in exchange for a reasonable sum, or has not yet found it but has free time and the incentive to search for the thing. The former idea tempts her. Yet she discovers an inconvenience. Many people will find the offer interesting but not be fully convinced to embark on the search. The offer of a unilateral contract is, by definition, a revocable proposal. The offeror is entitled to lose her interest in the proposal and revoke it at any time before someone returns the lost thing. This, in the mind of the average offeree, signifies that one may have already discarded other plans, spent time, efforts and resources, have the illusion of finding the lost thing and getting the reward and, when some progress has been achieved, have to accept that the proposal was revoked. This, in the mind of the average offeree, signifies a high degree of risk… How could our agent avoid that risk? Our agent thinks, by eliminating it.[431] She decides to ideate a promissory obligation.

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[431] Here there are similar considerations but in the context of other unilateral promises:

> What the offeror thinks he will get is an increase in the probability of exchange with the offeree. In some cases, an offeree is highly unlikely to consider an offer at all unless it is firm. For example, if an offeree solicits an offer for the purpose of determining her costs in providing goods or services to third parties with whom she proposes to contract, she is unlikely to consider an offer that is not firm, because she could not reliably determine her costs on the basis of such an offer. In other cases, an offeree is likely to give more consideration to an offer if it is firm than if it is not. In deciding whether to accept an offer, an offeree must make an investment in deliberation. The offeree is more likely to make such an investment, or is likely to make a greater investment, if she is sure that the offer will be held open for a certain period while that investment is being

This is a simplified version of how promisors arrive at the idea of ideating a promissory obligation. The point is not to exchange a performance for the thing one ultimately wants, nor it is to exchange a performance for a reciprocal performance of doing or giving. The point of an interested promise is to induce confidence in the creditor so that he creates the chance that we will gain something that we want. We exchange a performance for the enjoyment of a chance.

5.2.2.2. BASIC ELEMENTS OF THE PROMISSORY OBLIGATION

Let us now investigate the composition of the promissory obligation. As a voluntary obligation, the promissory obligation comprises a debtor, a creditor and a duty or right over a performance.

(A) THE DEBTOR

The debtor is the person of the obligation who owes some giving, doing or not doing to another. The debtor of the obligation caused by the unilateral promise cannot be other than the promisor. A rule by which a person could, by her own choice, choose that another becomes her debtor would contravene the principle of freedom.[432] (This does not mean that the promisor gets nothing from the transaction, that the unilateral promise is gratuitous. It means only that the promisee cannot assume the role of debtor).

(B) THE CREDITOR

The creditor of an obligation is the person who owns the giving, doing or not doing that the debtor owes. This right entitles him to use, enjoy the fruits of, and dispose of the owed performance. He can show off his right, use it as a warranty and most relevantly, he can claim what is owed to him when due and liberate the debtor with a unilateral choice.

Every obligation has a creditor and the creditor of the promissory obligation is the promisee, the addressee of a promise to make a contract, a promise of a reward, a fake gratuitous promise and all imaginable unilateral promises. We will study the diverse

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made. The purpose of a firm offer in this context is to induce the offeree to make such an investment so as to increase the probability of exchange.

Melvin A. Eisenberg, "The Revocation of Offers," 2004, Wis. L. Rev., (2004), pp. 271-308, at p. 282.

[432] To put it differently, one could never ideate a promissory obligation whereby one appears as the creditor. This idea would be more like the offer of a synalagmatic obligation. To illustrate, someone who offers a synalagmatic obligation to another is someone who is offering to be both a debtor and to be a creditor. The acceptor of this obligation is not only accepting the offered performance but also the duty ideated as its correlate. By the executory contract of sale, for example, the offeree is not only accepting the right to receive the thing but also the obligation to give the money.

types of promissory creditors in 5.3.1, where I examine the possible promisees of a unilateral promise. I must first advance two points however.

First, the promisor will not satisfy her interest—acquire the chance—if she does not select the right creditor. I would not be satisfying my interest in having the chance to engage consumers of my new Motorbikes Magazine if I send the promise of a free year's subscription to the inhabitants of a monastery. I am misplacing the creditor. For, even if I grant the monks a year's free subscription, none of them will ever order the issues; far less become consumers after a year of consumption. The interested promisor must select an adequate creditor. As we will see in 5.1.3, the formation of a unilateral promise demands a special kind of promisee, one that uses a specific mode of reasoning.

Secondly, the mindset of the creditor that the promisor selects influences the choice of the design of the performance that she is to obligate. If I want the chance to have my dog back, I have to ideate my obligation in a way that may appeal to the average person likely to search for the dog. It is obvious that the promise cannot be addressed to a businessperson, professional football player or actor. This promise must be addressed to a young person or, in general, someone who is looking for odd jobs. Moreover, it is probable that this person will not be interested in acquiring a performance of doing, e.g. I promise a public congratulations in the event that... This potential creditor is interested in a performance of giving, e.g. I promise to give money in case that... The potential creditor will influence my choice of not only the modality of the performance, but also of its quality or quantity.[433] Thinking as he would think, I will have to calculate how much I should promise so as to encourage a person like him.

(c) The obligation's object: the performance

(c.1) Giving, doing or not doing

The object of an obligation is a duty and the content of this duty is what we call "performance." The performance can be a giving, doing or not doing. This traditional classification serves quite well for the determination of the various promissory

[433] Three quotations: "Typically, the recompense promised is vastly greater than the worth of the offeree's time and skill measured on a pure *per diem* and out of pocket basis." Llewellyn, "Our case of contract," in *The Yale Law Journal*, Vol 48, No 5, (Mar., 1939), pp. 779-818, at p. 806. "To induce him to make that bet, the reward must be high enough so that the reward, multiplied by the probability of gaining the reward, exceeds the offeree's investment." Eisenberg, Melvin A., "Probability and Chance in Contract Law," UCLA L. Rev., 45, (1997-1998), pp. 1005-1076, at p. 1049. "[…I]n the case of prizes, the recompense is often vastly greater than the market value of the benefit the offeree confers upon the promoter, as evidenced by cases where a golf-hole-in would entitle someone to a Chevrolet Beretta [Cobaugh v. Klick-Lewis, Inc, 561 A 2d1248 (Pa. Super. Ct. 1989).]" *Idem*, p. 1042.

obligations. For example, the performance in a fake gratuitous promise cannot be other than a giving: I will give you X. The performance in a promise to make a contract cannot be other than a doing: I will make (do) X contract with you. The performance in a promise of a reward can be about a giving, doing or not doing. An example of the last possibility: Big Industry A says to Environmental NGO B "I will no longer use X chemical in my products if you promote this good deed of mine in your advertisements." The classification of the performances is not exhaustive. In the letters of patronage the promisor "warrants" the promisee that a third party will pay her a debt (see 1.1.3.4).

(C.2) PURE AND SIMPLE PERFORMANCES

Furthermore, the giving, doing and not doing could be pure and simple or qualified with a period or condition. It is only in the fake gratuitous promises that the performance can appear as purely and simply obligated. The promisee acquires the claim to the gift from the very moment that he receives the promise, without having for example to inform the promisor that he will go to her market and take the gift. The promisor appears as purely and simply obligated in the sense that she has to give a gift solely on foot of the claim of the consumer.[434]

(C.3) PERFORMANCES WITH MODALITY: CONDITIONS AND PERIODS

The rest of the promissory obligations appear with some type of "accident." In the promise of a contract, for example, the accident is what I call a "potestative condition." The situation is one where someone obligates herself to make a contract with another. This means that the promisor cannot do something that could hinder the realization of the promised service. But this does not mean that the promisor must do the service described in the promised contract. For her to be obligated to perform that service, the promisee must make a choice. He must communicate to the promisor that he wants to exercise the choice he earned with the promise. The performance of the promisee is potestatively conditioned in the sense that its exercise depends on his choice (potesta).

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[434] Jonathan Garton, "Charitable Purposes and Activities," in *Current Legal Problems*, Vol 67, Issue 1, (2014), pp. 373-407, argues that to find out whether an organization has a charitable character we better look at the activities that the organization carries out and not to the name or structure of the organization. My argument, *mutatis mutandi*, is that some promises are charitable only in legal structure or name. If one focuses on the interest leading retailers to make gratuitous promises, then one can tell that the promise is not charitable at all. Rather than looking at the terms of the promise, whether the performance is done in exchange of a real or personal right, I enquire into the purposes leading persons to obligate themselves.

Time periods are quite useful for interested promisors. The promisor could utilize a period to leverage the promisee's consideration. She says to him: "I am ready to provide you with this service. Think about it, it is at your deposal... Only one thing! You must have a decision by the end of March." Putting a time limit on the proposal may induce the promisee to consider choosing it more intently, for then the finitude of his time to choose is put explicitly.

(c.4) The quality: Legally and factually impossible performances

I need to repeat what I said in relation to the quality of performances.[435] The giving, doing or not doing must be licit, this is to say, legally and factually possible. A legally impossible performance could look like this "A will kill B." This is not a licit performance not because A thinks or knows that B does not want to be killed but because A must know that B, akin to A herself, is a private law persona, and as an equally free individual, B cannot want others to kill him. To be licit, the performance must be something that could exist in harmony with the freedom of all in private law. We will see more of this in 6.1.

A performance, on the other hand, would be factually impossible where its quality is highly improbable in its context. For example, a consumer cannot take as a unilateral promise an advertisement in which a company promises a trip to the Middle Ages to the first collector of a thousand coupons. To be sure, it is not impossible that we invent a means to travel to the past. But at the moment of the promise that machine is known to be fictional and no reasonable person would think that something like it will come to exist in the near future. The addressee must therefore take this "promise" as of a highly improbable performance and therefore not take it as a promise. The promise of an illicit or impossible performance is absolutely null due to a lack of object.

5.2.3. The promisor must dispose of her ideated obligation by making a promise

The promisor has already ideated the promissory obligation. In other words, she has imagined who would be the best possible creditor for the obligation of her unilateral promise, what performance she should make obligatatory for herself in order to induce him to create the chance she wants, and under which conditions she should obligate the performance to make the promise most effective. The next step is to choose the tool that renders a promissory obligation valuable.

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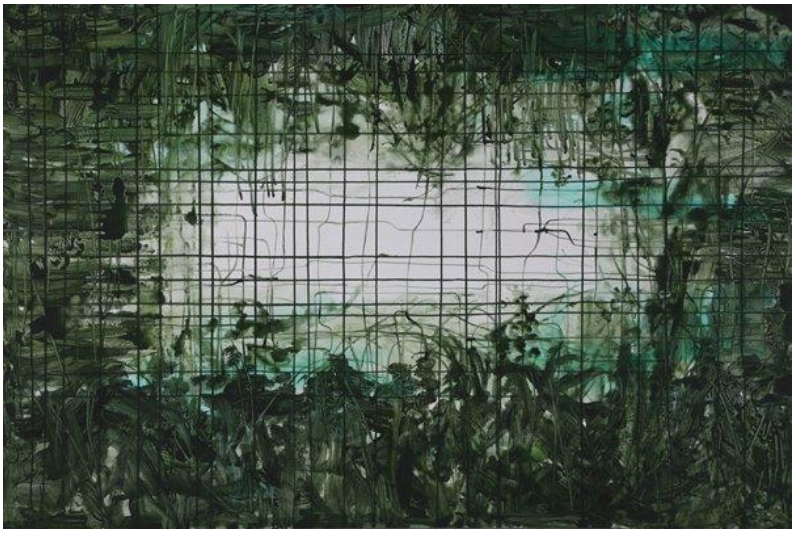
[435] For more on this go to 4.1.4.3 (a).

THE Making oF (MY/a) juridical concept



1. Pierluigi Pusole, 2007, http://www.galleriabagnai.it/en/works.html?id_artist=9c92bc96-bcc6-40b2-aa39-6e7bfbec66bb. **2.** Thomas Demand, Office, 1995, http://dailyserving.com/2015/09/from-the-archive-help-desk-giving-up/ (This is Alberto Caselli's selection.)

5.2.3.1. The ideated obligation and the unilateral promise

Before getting into the act of promise, we need to distinguish promise from voluntary obligation. Assume that a promisor perfectly ideated the obligation of a promise of a reward. She selected the right creditor and determined the performance effectively. The idea is brilliant. However, rather than dressing the idea with a promise, she happens to present it with the vocabulary of offer. She says to the public: "I offer 100 EUR reward to the person who returns to me my lost dog." She had the intention of obligating a performance of hers so that a chance would be created through the actions of the addressees. But she failed to induce the public to effect these actions. The addressees thought that the proponent was interested in an exchange of an obligation for an act and from this they inferred that the proponent feels entitled to revoke the offer. For this is what the language of offers entails! Since the addressees did not have the assurance that promises give, they were not confident enough to create the chance that the proponent sought. As a result, the value of the ideated obligation could not come to fruition.[436]

Something like a declaration of promise is needed to render the promissory obligation valuable. Another sign of this is the fact that the communication of a person's intention to be obligated seems to be insufficient to constitute an obligation. "Look, I want you to know that I have the intention to obligate myself to you. It is a very interested intention. You will be sure that I will not revoke my proposal of a contract, and this assurance of yours will serve me. For if you are sure that I will not revoke, you will probably be prone to invest thought and resources in evaluating my proposal. Once again, this intention of mine, that I am communicating to you, is very strong and firm." These words are quite informative of my intentions. Informative as they may be, these words effect no legal change. At most, I would be preparing you for the final shot. I would be advancing information to facilitate a later legal declaration. A declaration that may integrate the given information, to be sure, but a declaration without which there is no legal bond. In themselves, words communicating intentions to be obligated are one of those communications that persons make to each other without incurring obligations. If I want

[436] By the same token, someone could end up bound to a promissory obligation without having actually intended it. The case is of someone who seeks to invite another to accept a contract and, instead of using the words of offers, presents her proposal in the form of a promise.

to jump the barrier of the simply licit interactions (see 4.1.3.3.1), I need to make a promise.[437]

5.2.3.2. THE DECLARATION OF PROMISE

A declaration of promise is essential for the formation of the promissory relationship. This act of the promisor is intentional. This means first that the promisor must have willed the promise and not promised by mistake, under the influence of violence or an insurmountable need. Secondly, the promise is other-directed, an act whereby the promisor addressees the promisee to bring about an effect—the obligatory relationship. Thirdly, promise is by definition irrevocable. This is to say, the significance of promise—to bring about an obligation—is achieved with its reception; no requisite act other than reception intervenes between the promise and its reception. Fourth, the promise is juridically intended. This means that the language the promisor uses to address the promisee connotes law—its authority, arguments, logic, and if there are any, institutions. Finally, the obligation involved in the promise is oriented to be reciprocated by a further act—the act whereby the promisee creates a chance for the promisor.

Let us examine in detail the essential requirements for the adequate formation of a unilateral promise and study the practical reasons behind these legal requirements.

(A) THE PROMISE MUST HAVE BEEN (FREELY) DECLARED

The significance of promise is that it operates a specific change in the status of the parties—it obligates the promisor to the promisee. For this to occur both the promisor and promisee must know that promises obligate. So, if I happen to want to relate to you via a promise in a state of nature scenario, I must, with the promise itself, make you

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[437] Even in a society of perfect communication, where there is no need to speak to communicate to others what one thinks, there must be an act ulterior to the ideation of the obligation, an act by which the promisor says to the promisee: "from now on it is that this idea that you know binds us."

To be clear, a perfectly made promise is more than the outward expression of the inwardly ideated obligation. Promise is not the external manifestation of an internal experience. I could be convinced of having the internal experience of intending to obligate myself to another and, on the bases of my conviction, inform the intended creditor of this intention of mine. As if I said to you; "In what I am intending now I am obligated as against you to do X in the time T whenever V condition obtains." By assuring you of my intention, I am not merely relating myself to you, but also addressing you in a way similar to that of promises: I turn to you and evoke your turning to me (See 5.3, especially 5.3.2.1). What is more, my communication consists in what by definition goes in a promise: a voluntary obligation (See 5.2. especially 5.2.2). This information, in other words, could itself be the substantial object of a promise. What is missing then? What is missing is the act of promise.

understand that that which you are receiving is to be taken as productive of the obligation that you can also identify in the act.[438]

We have said that the promisor must be able to want (have legal capacity) and have something to want (be owner of the thing she is promising). We also said that the promisor must have wanted or ideated the promissory obligation. Now I want to say that the promisor must want, spontaneously want to make the promise. Let me illustrate what I intend to say with an example: Suppose that someone chooses to make a promise whose customary body is a certain kind of formulary. She ideates the promissory obligation, writes it down in the requisite document and signs the document. Did she make a promise? I would say that she did not. From these deeds must follow the declaration of a promise—the spontaneous decision made by the check issuer to transfer the check to the receiver.[439] Even when I sign the check on a table in front of the person who will happen to be the bearer, the promise is not actualized unless and until I pass the check, hand to hand, to the bearer, most likely looking deep into his eyes—at least, in juridical private law.

Promise is a sudden act, something that begins, produces all its effects and passes away in an instant. Accordingly, the examination of the formation of the promissory relation, whether the promisor was a minor, mentally ill, or excessively drunk, whether the promisor acted under an irresponsible mistake or the promisee took her promise under threat of violence have answers in reference to the spatio-temporal moment of the promise—not to the development of the promissory relation. It follows from this that promises must be made in the present tense. "I promise you this and that" or "I hereby commit myself to do this or that at your request." If you say, "I promised you X," you are not making a promise, but perhaps offering proof of a promise that you made in the past. Finally, promise could take the form of a voice or written word. What is paramount is that the promisee could tell, through the message conveyed by the promise itself, that the promisor is making him a promise.

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[438] Yet I think that the question of whether the declaration of promise must be expressive of the rule that what the promise is intending to do generally obtains is not an issue for discussion in the context of private law. With its rules, concepts and principles private law sets out what persons do and can do. If the significance of promise is recognized by private law, then it matters little if this or that promisee could tell that the stranger who addressed him made a promise. If he never got it he will never demand. If he is surprised, he will seek counsel. And if the lawyer is informed, as she is supposed to be, then no doubts will remain about the significance of the received message.

[439] Indeed, signing a check is not making a promise to the prospective bearer; no one becomes a debtor by signing a check. One is just exacting the tailoring of a voluntary obligation whose customary substratum is a certain type of scripture. For reasons of safety, signing the document is ordinarily the last moment of the valuta's confection. But this does not mean that the issuer made a promise.

(A.1) THE CASE OF PROMISE BORNE OF VIOLENCE

A promise would be invalid for lack of intention if the promisee extracts the promise from the promisor with violence. For example, we are in a bar talking about the possibility that I issue a promise of a contract for you. You are trying to convince me that this would give you the right incentive to seriously consider my services. So far there is no violence. You have actually made some progress in convincing me. I take a piece of paper, write a promise and even sign it. Yet, I do not give it to you. I repent and you go wild. You start shouting at me; that you spent a long time convincing me, that I made you think that I was going to make the promise, that this cannot be happening, and so on. I say I am sorry but you snatch the paper from my hands and leave the bar. You took my promise by means of violence.

Obviously, nothing in the promise itself indicates that you took it out of violence. I will have to prove that this was the case. In other words, you will be able to claim my contract without any more proof than the written promise, and if I don't want to accept your claims, I will have to prove that you took my promise through violence. A difficult proof, but yet it is just to accept its possibility.

(B) THE PROMISE MUST ADDRESS AND… REACH THE PROMISEE

The way in which the promisor addresses the promisee is idiosyncratic—the promisor turns to the promisee, evoking the promisee's attention. When someone declares a promise to another, one is turning into the other, conveying a right to him. In this interaction the promisee is not indifferent. He hears the promise and takes *cognizance* of the promissory right. He grasps by means of the promise that which is expressed in it.[440] The promisee is however passive in a sense. His enthusiasm (or lack thereof) towards the promissory right is irrelevant to the sudden formation of promise. By the time he desires to reject the right he has already acquired it.[441]

Once again, promises are in need of reception. If the promisee played no part in the declaration of a promise, as some scholars have maintained,[442] the promisee would be as

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[440] "He must grasp through them that which is expressed in them, he must take cognizance of the act of promising itself, he must, as we would put it somewhat more exactly, consciously take in the promise (des Verprechens innewerden)." Adolf Reinach, "The A Priori Foundations of Civil Law," (John Crosby translation), Aletheia, issue 3, (1983), pp. 1-142, at p. 28.

[441] We will see that the promisee can respond in different ways to that which he takes in, claiming it, rejecting it and even forgetting it. See 5.6.2.2. and 6.1.4.2.1.

[442] Here is where the unilaterality of unilateral promise rests. The promisor takes preponderance in the interaction. He ideated its object, will assume the object's most sensitive position and actualizes it in the

any other; the promise would never have given him a right, connected him with another person. We, on the other hand, would never make a promise if we knew for sure that the other is incapable of becoming aware of it. Promises form nothing if they have never been received. As Adolf Reinach puts it, "They are like thrown spears which fall to the ground without hitting their target."[443]

(B.1) The case of one who has never been the promisee

Ignoring your promise of a reward, I find your lost property. I am aware of the fact that the thing I found belongs to you and I decide to return it to you. I performed the requested act, not induced by the promise, but by my good will. Then I come to know that you promised a reward for the act I performed. My lawyer advises me to claim the reward and I do so. You neglect the promise and I demand it of you you in court. According to the (juridical) law of unilateral promises, I have no right of action here. To be entitled to the reward I had to receive the promise. If you manage to prove that I retuned your property ignoring the reward, you will have debunked my claim (For a different solution and my criticism see 2.4.3.1).

(C) There must be no doubt about its irrevocability

In principle, it should be clear to any addressee of the words "I promise" that the declarant is no longer able to decide whether to do or not to do what she promised, for promises obligate. It would denaturalize the sense of promise if one had to think that after receiving a promise the promisor could free herself from the obligation by just saying: "No, no, I regret, do not accept my promise." In this promises are like gifts. When one receives a gift, even before one calls the giver to express thanks or to reject the present, one feels oneself

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promise. But this does not mean that the promisee assumes no role on the promise making process, as other unilateral promise scholars maintain.

Martin Hogg, for example, has talked about the acts of the promisees as one of the "Things which are not components of the definition" of promise. "It is further asserted, as a general point, that the effect produced by a promise in the promisee's mind and in any actions of the promisee are not relevant to the definition of a promise. The focus is properly on the promisor, as it is his intention and actions which may constitute the normative act of promising and may give rise to a binding obligation." Martin Hogg, *Promises and Contract Law: Comparative Perspectives*, Cambridge University Press, Cambridge and New York, 2011, p. 25.

I have repeatedly argued that a definition of promise that does not require an act on behalf of the promisee cannot be a private law relation. It may sound within a specific moral theory, or within a public law conception of private law but not in the context of an autonomous private law. (See 3.2.1. and Introductory Part.1.1.) Here we determine promise as a declaration and it is in the nature of declarations that another hears of declared thing and takes awareness of it. Otherwise the declaration is a noise, not a declaration, something impacting or falling over a totally passive subject.

[443] Adolf Reinach, *op. cit.*, p. 19.

in possession of the gift. One does not expect the giver to ask for the gift back without a serious reason. As with gifts, in promise there is no place for revocation. Revocation can take place only where the thing given is conditional on a further act, like a ratification of the giver or the acceptance of the receiver. A revocable promise is like a contradiction in terms.

However, there are missuses of language. We often say things like; "I promise you that I was not there," "I promise you that I am telling you the truth" and other statements, which properly speaking are not promises. Moreover people use the word promise, "promessa," "Versprechen" and other translations in the context of contractual transactions. More specifically, they intend to say "I offer" but say "I promise." The question hence arises, whether the illocution produces the intended or right effect. In my opinion, the issue is a question of fact. If the proper meaning of promise has been settled in the community to which promisor and promisee belong, the promisor cannot say to a promisee that she intended to say "offer" when she said "promise." It would be immaterial if the promisor were to prove revocation of the promise before acceptance, for promises are irrevocable. On the contrary, if it is not at all clear that promise means irrevocable commitment, and the declarant said the word promise in a text and context that cast doubts on the character of her commitment, then such declaration, if it can be thought of as such, constitutes an offer.[444]

(C.1) WHEN THE PROMISE IS TAKEN AS AN OFFER

In case of doubt, and if the declaration can be thought of as an offer, then the declaration must be taken as an offer. Why as an offer and not as, for example, an invitation to make an offer? Briefly explained, the issue here is whether the proposal was irrevocably intended or not. If it was, then it constitutes a promise. If it was not, then it does not constitute a promise. If it is settled that the proposal was not a promise, but nevertheless it is viewed as an offer, then the defendant cannot argue that as it does not constitute a promise, the proposal does constitute an offer either. The reason for this is that the defendant declared operative words to the claimant. If what she made was almost a promise and also an offer then what she made was not a promise but an offer. In these

[444] Di Giovanni notes this problem in the Italian jurisprudence on public advertisements. The fact is that judges lack a criterion to distinguish "offerta al pubblico" and "promessa al pubblico". Following Di Majo, he offers the criterion of the "negotiability of the wanted fact": "the most efficacious example is given from the difference that runs in between promising a compensation to 'whom will treat my wife' (the promisor solicits a 'negotiable' fact) and promising a compensation to 'whom will cure my wife' (the promisor promises a remuneration as a consequence of a non 'negotiable' fact)." Francesco Di Giovanni, *Le promesse unilaterali*, Cedam, Padova, 2010, p. 198.

types of cases, the claimant can demand firstly a promise, and in substitution, an (accepted!) offer.

(D) THE PROMISE MUST SUGGEST LEGAL INTENTION

One could become obligated to another by a consistently repeated conduct, as where I have been letting you draw water from my fountain every Monday for the last four years, making you think that I benefit you with the intention to continue benefitting you. This circumstance, call it what you want, creates the obligation that this Monday I will let you draw some water from my fountain.[445] The obligation of promise arises with the declaration of a promise, and declaring a promise is a speech act—namely the illocution of terms synonymous to "I promise," "prometo," "ich verspreche."[446] But here arises a question, do all declarations of promise obligate promisors in legal terms? No, must be the answer. "Sofia, I promise you I will not cheat on you," "Diego, tomorrow I will go with you to the Cinema," "Mama, don't be sad, I will quit smoking after New Year's eve," are examples of promises and nobody will prima facie interpret them as legal promises. So what is it that makes a promise a legal promise?

The first indicator is the language used by the promisor. What is the language suitable for invocation of the law? Arguably, there are words, the first or most conventional meanings of which are legal. The words "obligation" "duty" "irretrievably," the phrases "I hereby promise," "I bind myself to…" are eminently legal.[447] So when someone uses these words to make a promise she is prima facie making a legal promise. But this is more a question of fact than of law. Suppose that A and B have developed a language of their own. In this language, some words indicate things that they generally are not. Among those words, some indicate legal concepts. Though these words would not indicate legal concepts in the public speaking sphere, they would indicate legal concepts in the parties' intimate language. So these words are legal words, though only between A and B. The important

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[445] You can call it obligation by typical conduct and ground it on the principle that nobody can change her own design to the prejudice of the other. If I want to interrupt this obligatory relationship I must tell you in advance, probably a considerable amount of time in advance, that I no longer want you to draw water from my fountain.

[446] "And the act of promise, like any other social act, can only be grasped through some physical medium; they need an external side if they are to be perceived. Experiences which need not turn without, can unfold without being in any way externally expressed. But the social acts have an inner and an outer side, as it were a soul and a body. The body of social acts can widely vary while the soul remains the same." Adolf Reinach, *op. cit.*, p. 20.

[447] With my PhD, I aim to introduce new vocabulary to the law, the vocabulary of "unilateral promise," "promissory relation," "promissory obligation," "right over the benefit of the chance," I introduce this new vocabulary because I am determining a legal concept for an unrepresented (or unnamed) juridical reality.

thing is that the promisor uses words that the promisee could take as words connoting a promissory obligation.

The promise must use legal language; ok, but does this mean that all promises using legal words are really invoking the law? A friend says to the other: "Diego, I will show up tomorrow at nine. If I don't you can take me to court." Or an actor uses legal words to promise something to another in a play. Are these examples of promises? No, they cannot be so. Why? The use of the law words is not honest but ironical or fictional. Take this case: "I hereby irrevocably promise you that I will not on cheat you. I am invoking justice and its language to give you the assurance that if I ever cheat on you, you will be entitled to yield against me the most burdensome blames… No, Sofia, be sure I will not be with another while we are together." The promise comes when the listener can tell that the language is being used honestly. And the language of the example is used honestly when the lover makes a moral, not a legal promise to her beloved. Family, friends, lovers and acquaintances are generally not the social contexts where one will honestly invoke legal concepts. [448]

Still, it could be that persons use common or even friendly language to make legally intended promises. So, for example, a merchant who has been doing business with another for some months says to the other, "Hey Mike, take it easy, Steven [her employee] will show up next Friday with the boxes. Trust me." The promisor is not using legal language here, but it is evident that the promise is serious. Then how are we to tell whether a promise is legally intended if it does not use law words? Well, there are many indicators. Once again, probably the most effective indicator is the context. The marketplace, newspaper, publicity boards and interactions between relative strangers are social contexts where one will generally speak seriously to each other. Another important indicator has to do with the quality and quantity of the promised thing. "A thousand euros" sounds different to "fifty cents," "a brand new Porsche" is somewhat

[448] "A considerable number of cases concern this *animus contrahendi*. Beginning with sham "contracts" which fail because, by hypothesis, the parties, in drawing up the instrument, had some other object than the creation of contractual rights; and continuing through the line of "contracts" made in jest, and "contracts" made in excitement, we arrive at cases which definitely hold that an affirmative intention to assume a legal obligation is the essence of a contract. Such are the cases in which, from the fact that another and more formal contract was later to be executed, the courts have inferred a lack of intention to enter into legal relations, notwithstanding the former agreement answered all the requirements of form and content necessary for a contract. Such also are the cases in which, from the situation of the parties, courts infer a lack of the requisite intent: social and domestic relations have given rise to judicial inferences that the parties did not intend legal consequences to flow from their promises." Jerome W. Thompson, "Covenants not to sue," in Association of American Law Schools, (ed. and compiler), *Selected readings on the law of contracts from American and English legal periodicals*, Macmillan, New York, 1931, pp. 166-167.

different to "a gelato." Yet a reseller could promise a free gelato to every visitor of her opening store with a view to making the shop known.

Whatever words the promisor uses the essential requisite is that the promisee grasps that he received a legal promise. Only a legal promise will give the assurance that promisees need to create the chance. On the other hand, only a legal promise will bring promisee and promisor to the game of private law, a space of rules, concepts and principles for advancing, backing and contradicting, juridical claims.

(D.1) THE JOCULAR PROMISE

It is probably in the realm of promissory advertisements that the issue of whether the promisor really intended to obligate herself or not emerges most frequently. We have settled some criteria to resolve this issue in the previous section and in 5.2.2.2(c4). A particularly illustrative case is the American decision *Leonard v. Pepsico.* [449] An advertisement said that PepsiCo would give an AV-8 Harrier II jump jet to whoever redeemed 7,000,000 Pepsi Points. The plaintiff claimed to have performed the task conditioninal to the reward that PepsiCo promised. PepsiCo argued that the advertisement was intended to be humorous. And there is no better way to appreciate that it was a jocular promise than watching it.[450] The court found for the defendant on the grounds that no reasonable person could ever believe that such advertisement was seriously intended, that PepsiCo could have not promised a jet priced at more or less $23 million in return for the cost of redeeming the 7,000,000 Pepsi Points. This was not a promise but mere puffery.

(E) THE PROMISE MUST BE MADE TO INDUCE THE PROMISEE TO CREATE THE CHANCE

A sub-contractor says to a general contractor: "I promise I will do N for you at the price Y, under Z and U conditions. You don't have to request this service now; you count on it for when you need it. I will not change the terms. I really want to work with you." What is the object of this promise? A lawyer who ignores the concept of unilateral promise must say: "The object is an obligation to do, by which the subcontractor has the duty to make X contract when the general contractor requests it." This answer is correct but incomplete. As we will see in 5.4-5, there is a way in which we can think of the reception of a firm promise of a contract as the creation of a right for the promisor. The lawyer who is acquainted with the concept of unilateral promise can tell that the object of the promise

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[449] http://www.classcaster.org/449/10564-Leonard%20v.%20Pepsico.pdf (13-08-2015)

[450] https://www.youtube.com/watch?v=U_n5SNrMaL8 (12-08-2015)

in the example is not only the obligation to make a contract but also the right to enjoy a chance. The right answer to our question is, "the object of this promise is a promissory relationship, where the creditor has a right to a contract and the debtor (rightfully) enjoys a chance to make a contract."

What about this other example? A little old lady sends a letter to the neighborhood's high school saying that, as she is aware of the fact that the school is collecting money to renew the football pitch, she is willing to contribute the sum of $1000. Here there is a promise. According to the words and the context, moreover, the promise is firm and seriously intended. What is the object of such promise? A lawyer could say: "The object of this promise is an obligation to do something, by which lady X has the duty to give $1000 to school Y." Is this answer right? If the text of the promise is all the relevant information that we have, then "Yes, the answer is right" and full stop. The object of this obligation is an obligation to do, which the promisor ideated to benefit the promisee. There is nothing that the promisor could be said to receive from the promisee in exchange for her promise. If the promisor is better off in some way, this relates to her emotional state. Unless the promisee is able to link the promise to a relatable cause, say the school were able to prove that the promisor made the promise in order to pay an unenforceable debt,[451] or that she made the promise to support her son's ongoing Dean of Studies campaign,[452] the promisee cannot claim the right to the promisor (See thought 5.2.3.2e.2). Unreciprocated obligations are not enforceable in private law.

(E.1) THE TYPICAL UNILATERAL PROMISES

How do we know that the promise is oriented towards, and in fact induces the promisee to cause a chance for the promisor? As I advanced in 5.2.2.2(b) and will develop in 5.4, the promise must be addressed to a specific kind of person, someone with a bargaining mode of reasoning. Only such individuals are in possession of the tools that produce the chance that an interested promisor seeks. Only with the possession of such tools can a promisee say: "Look, you made me this promise because you knew that I am in the construction business and, like any member of this society, I am accustomed to considering service proposals, giving special value to firm ones. It is obvious that your firm and legally intended promise was made so that I might give it special consideration."

Still, a promisee need not always elaborate that much in court. The easiest way of saying "your promise was oriented to make me produce a chance for you" is by saying "you made

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[451] This claim would qualify the promise as a retributory promise, see 4.1.4.3(b).

[452] The point is inspired by the Roman law case in Justinian, Digest, 50, 12, 10.

me X or Y unilateral promise." The typical unilateral promises are the promises that everyone knows that promisors make in their own interest (see 1.1.3.4). The task for positive law is to determine them from the perspective of the concept of unilateral promise. That is to say, to specify the outlook of the promissory obligation and the kind of promise through which promisors dispose of the obligation, the sort of promisee this promise is addressed to and moment from which it is reasonable to say that the promisee receives the promise, the mode of reasoning that leads these promisees to produce the chance, the content of the emerging chance and finally the mode in which such chances benefit the promisor. So, for example, the "promise of a contract" is a typical unilateral promise. The promissory obligation is about the duty to make a certain contract. A promise of a contract must be made in written form. The reception of the promise occurs when the promise reaches the promisee's firm or residence. The promisee must be someone involved in the construction business. The chance emerges from the comparison of the promise to other contradictory promises and offers of the same service. The chance consists in that the promisee may choose the promisor's service. The chance may consist in a benefit for the promisor because she may be willing to sell an important service, engage in a prestigious construction project or show her qualities as partner to the promisee.

Note however that no legal statement can be conclusive. So the promisee could prove that the promise was duly declared, albeit not written, or that the promisor benefited from a different fact, e.g. she made the promise to obtain the chance of undermining her competitor. What is even more important is that the elements of the concept of unilateral promise allow the promisee to elaborate a case for an atypical unilateral promise, a promise that only very specialized observers, or even no one previously, noticed promisors make in order to obtain the benefit of a chance. The promise must, in the eyes of the promisee, suggest a promissory relationship. If it does so, then the promise is a unilateral promise and therefore it obligates the promisor to do what was promised. If it does not, then the promise is not a unilateral promise and notwithstanding the other legal effects that it may provoke, it falls short of giving an enforceable credit right to the promisee.

(E.2) GRATUITOUS PROMISES CAUSE NATURAL OBLIGATIONS

A promise could very clearly indicate that it is honestly intended to produce legal effects, but be unenforceable due to a lack of cause. The interest motivating the promisor was neither to compensate an unenforceable debt nor to make the promisee produce a chance that he does something she wants. Her interest was purely a charitable one. Yet does this mean that gratuitous promises have no legal effect at all? Promises without cause or

consideration do have a legal effect. Technically speaking, simple promises cause what we call "natural obligation." The operative consequence of this old concept is that the natural creditor cannot claim her performance from the debtor but, if the debtor voluntarily performs her natural duty and then claims recovery for lack of title, the creditor can oppose the promise as granting title over the acquisition.[453]

So, to make it clearer, suppose that a promisor performs her gratuitous promise. If such promise had no legal significance at all, the promisor will have a claim on restitution. She will be able to say, "Hey, I gave you this money without reason or cause, so you should give me that sum back." But no private law would adjudicate like that. The payment of gratuitous promises is irrecoverable because gratuitous promises are causes of natural obligations; the greatest significance of which is to serve as title for the purpose of banning actions of restitution.[454]

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[453] "Natural obligations are not estimated solely by the fact that some action can be brought on account of them, but also where the money, once paid, cannot be recovered. For although natural debtors cannot strictly be said to be indebted, still they may be considered such, and those who receive money from them to have obtained that to which they were entitled." Justinian, Digest, 46, 1, 16, 4. I am utilizing this version: http://droitromain.upmf-grenoble.fr/Anglica/digest_Scott.htm

[454] There are some other legal implications of natural obligations. First of all, the natural creditor who is, by an independent cause, civil debtor of the natural debtor can use her natural credit to compensate her civil debt, provided that the object of natural credit and debt is of the same quantity and to the extent of the difference. So if Daniela has a natural credit of $10 as against Fernando, Fernando has an enforceable credit of $20 as against Daniela and Fernando claims payment of the $20 to Daniela, Daniela can argue that she only owes $10 to Fernando, given the title of her natural credit right (Dig. 16, 2, 6). Secondly, a natural obligation could become a civil obligation through novation. Fernando and Daniela agree that Fernando gives $10 to Daniela so that Daniela pays her natural debt in December 12th. Fernando's natural credit of $100 as against Daniela becomes an enforceable credit (Dig. 46, 2, 1, 1). Last but not least, if a third interested party gives warrant to the natural creditor that she will pay the natural debt, if the warrant is valid, the natural creditor has an action as against the warrantor in case of breach of warranty (for example in Art. 518 of 1871 Argentinian Civil Code).

Now let us perform this thought experiment. Assume that, from a purely doctrinal point of view, promise itself performs the function of causing, grounding or being the title of a natural obligation. Now ask this question: Given that every firm and legally intended promise effects the legal outcome of causing a natural obligation, how are we to explain the enforceable promises, those that operate civil obligations? I will suggest that enforceable promises also cause natural obligations. Their difference from the gratuitous promises is not a difference of nature; both are legally intended promises in the same sense, just that one kind of promise is relatable to an independent counter-cause and the other kind is not.

Here things demand rigorous analysis. The point is that the transfer that any enforceable promise reciprocates performs the role of payment of the natural obligation that the enforceable promise causes. To illustrate, when the promisor makes a promise of payment to the promisee (see 4.1.4.3(b)), the promisor is naturally obligating herself to the promisee. But because the promisee (natural creditor) had an independent credit against the promisor (natural debtor), he can deem himself paid with the promise (natural credit), and therefore claim the promise's (natural) obligation. In this case the promise (thought of as assured future payment) constitutes a payment. If paying a natural debt with a manual transfer makes the transferred thing irrecoverable, mutatis mutandi, paying a natural debt with an intellectual transfer (promise) makes the promise enforceable.

5.3. REQUIREMENT TWO: THE PROMISEE *RECEIVES THE PROMISE*

5.3.1. THE OTHER PARTY TO THE UNILATERAL PROMISE IS THE APPOINTED PROMISEE

The promisee, the person who receives the promise and acquires the right, must be the person who the promisor thought of when ideating the obligation and effectively addressed when making the promise. Suppose that the promisor thinks of one person and addresses another. This is an easy case. I ideated the promise of X to Mario Leal and, despite wanting to address it to him, I address it to Victor Jara. As this could only happen via mail delivery, I should have said something like, "To Mario Leal" or simply "Dear Mario." Victor can easily tell that he is not Mario.

A more difficult case occurs where I think I am addressing the right person but am not. As where I think that you are someone else, however you are in fact someone who is planning to make a large-scale construction contract and so I promise you my services. What should the law be? These promises are generally written. If it is obvious to any reasonable reader that the promisor was mistaken, then the promise should not bind. However if a reasonable reader could feel himself entitled to the credit right, then the promise should bind. The question remains whether the promise is enforceable or causes a natural obligation. This is discerned by examining the question of whether the promisee caused the chance. If the promisee is also a contractor, then the burden of proof lies on the promisor. She will have to prove that the promisee did not cause the chance.

Scholars classify unilateral promises according to the type of promisee a unilateral promise can address.[455] There are three major types of promisees.

What I am suggesting is that, in very abstract juridical logic, banning an action of unjust enrichment on the grounds that the enrichment was just is like enforcing a promise on the grounds that the promise had reciprocation—non-recoverability being equivalent to enforceability.

Concluding, the correct thesis on promises and private law is this: Serious and legally intended promises obligate the promisor to the promisee, although the promisee can not always claim performance of the promise to the promisor. The promise perfectly obligates the promisor—the promisee can claim performance of his right to the promisor—whenever the promise can be correlated with an autarkic counter-cause or reciprocation. In the absence of cause, the promise also obligates the promisor to the promisee, though it does it imperfectly—the promisee has a right as against the promisor but cannot claim it on the grounds of justice. Still, the imperfect promise or cause of "natural credit" has at least four legal implications. Frist, if the promisor pays the debt she cannot recuperate it on the grounds of unjust enrichment. Second, the promisee can use the promise to compensate a duty of his as against the promisor-natural debtor. Thirdly, the natural debtor and creditor can novate the natural obligation into a civil obligation. Last but possibly not least, third parties can warrant the payment of the natural obligation.

[455] Probably the first making this classification is Worms, who introduces it in his treatment of the binding offers. Rene Worms, *De la volonté unilatérale considérée comme source d'obligations en droit romain et*

5.3.1.1. THE DETERMINATE AND DETERMINABLE PROMISEE

First, a unilateral promise could address a determinate person, as if I say to you, "Wanja Postel, I promise you that if you ever decide to give a job to my son Robin, I will hire your daughter-in-law." The determinate person could obviously be less determinate, as when I address a promise to "The Head of X Company."

A unilateral promise could also be addressed to an indeterminate but determinable person.[456] As when persons say "I promise to pay X money to whoever solves Y math problem." Who is the addressee of my promise? There is no person in particular. However, one can deduce from the content of the promise the kind of promisee the promise is addressed to. In our case, it is obvious that the promise is addressed to a mathematician, be this mathematician affiliated to a university or a free agent.

5.3.1.2. THERE IS NO PROMISE IF THE PROMISEE IS INDETERMINABLE

Some writers say that a unilateral promise can be made to an indeterminable person. The example is of a promise addressed to an unborn person. E.g. "I promise to give my library to your next child." The question is whether these promises bind the promisor.

The private law obligation includes not only a debtor and a performance, but also a creditor; it is a duty of one to another. If there is no determinable creditor, then: To whom could the obligation engage the debtor with? The unilateral promise scholars conceptualize the unilateral promise to include the borderline cases of promises without existing creditors. They succeed, for as we saw in section 3, they ground the obligation of promises in a general norm saying: do what you say. Hence promise can be defined as a unilateral statement by which one person is obligated to do something. Despite the attention that cases like the promise to the unborn garner, and probably deserve, I cannot comprehend them in the juridical conception of the unilateral promise. In just private law regimes it is essential that the act aiming to cause a voluntary obligation reaches the promisee, i.e. be communicated (and reciprocated). Cases like the promise to the unborn put the theorist in the difficult position of choosing to conceptualize the unilateral promise so as to include the borderline cases, or conceptualizing the unilateral promise

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en droit français, (thèse pour le doctorat présentée et soutenue le mardi 23 juin 1891, Université de France, Faculté de droit de Paris, by René Worms), A. Giard, Paris, 1891, p. 166.

[456] Carlos Martinez de Aguirre maintains that the national private laws and doctrines agree in that the indeterminacy of the promise's addressee is a characteristic feature of the promise of reward. "La promesa pública de recompense en el Derecho comparado," in *Revista General de Legislacón y Jurisprudencia*, Vol LXXXIX, No 6, December 1984, pp. 789-812, at p. 795-796. I don't see the reason why, conceptually, a promise of reward could not be made to a specific person.

so that it can cohere with the other institutions of a just private law. I have thus to decide: the unilateral promise must be *communicated* to a determinable person—the creditor.[457]

5.3.2. The promisee acquires the obligated performance by receiving the promise

5.3.2.1. The promisee acquires by reception

Now we move to a sensitive issue. The formation of a transfer of a right requires that a person disposes of a right and another person acquires the disposed right (see 4.1.4). We said that what the promisor disposes is a credit right or obligation and that the means through which the promisor disposes of that obligation is the promise. So far there could be little, if any, disagreement. The sensitive question is this: How does the promisee acquire the right?

My answer is as follows. True, for a transfer to exist, there must be an act of disposition and an act of acquisition, but acceptance, which is a mode of acquiring a personal right, is not the only mode of acquiring personal rights. There are other modes of acquiring personal rights *from* another person, like "*reception,*" which is the mode in which, I submit, the promisee takes the personal or credit right from the promisor.

Let me elucidate this mode of acquisition with an example:

The promisee finds a letter at her doorstep. The promisee gets interested in the letter, grasps it, opens it, reads it, and apprehends or receives the message. I want to suggest that the acquisition of the right takes place at the reception stage. In the process of intending to know what the piece of paper is, the promisee related the words, spacing, paragraphs, the margins, colors, drawings, the terminology used by the writer in the text, the time, space and circumstances in which the promise came to her, the promisee related all the signs with her educational background to identify or pick up the idea that the promisor invoked to her in his letter. This idea is a voluntary obligation. I want to suggest that, in intellectually grasping what the promisor expressed, the promisee takes on the credit of the obligation. The promisor lassoed her performance and tossed the rope to the promisee; when the promisee caught the rope, understanding what lay at the other end, the promisee took command over the performance—the rope linked the parties as in a private law obligation.

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[457] It obviously remains possible to argue that the promise receiver (the mother) acted as a representative of the promise's creditor (the unborn).

In short, the promisee takes the right when he happens to receive the promise. I will defend this technical development in 5.3.3. In 6.1.4 I justify it.

5.3.2.2. THE PROMISEE ALWAYS RECEIVES THE PROMISE

The time of reception varies with the mode of communication of the promise. For example, if the promise is made verbally to the promisee, the promisee may be reasonably treated as having received the promise from the moment that he could be deemed as having understood the promise. If the promise is made through a letter to the promisee, the promisee may be reasonably treated as having received the promise from the moment that the promise enters to his area of control, namely his house, office or wherever it is known that he receives his post.[458]

These are all questions of fact. Good faith in unilateral promising, which is an aggregation of the norms of dealings between reasonable promisors and promisees in typical unilateral promise scenarios, plays a central role in determining this moment. The relevant fact from a juridical viewpoint is that the promisee perceives the content of the promise from the promise itself. We do not need to discuss whether this indeed happens in the promises inter presents. The relevant discussion is whether reception in fact occurs in the cases of promises inter absents. Regardless of the fact that some people do not collect their mail, it has long been assumed that individuals cultivate awareness of their promises, offers and the other declarations that private law persons make to each other. The adage is "*Idem est scire aut scire debet aut potuisse.*" If this is not a legal fiction, on what basiss can we uphold it? I develop an answer in 5.4.2.1.

5.3.2.3. THE PERFORMANCE DISPOSED BY THE PROMISOR IS, WITHOUT MEDIATION, THE PERFORMANCE ACQUIRED BY THE PROMISEE

When the promisee receives the promise, the promisee acquires the right that the promisor disposed of by promising. Before the promise reaches the promisee, the promised thing belongs to the promisor. After the promise reaches the promisee, the promised thing belongs to the promisee. Through the promise, the thing passes from the

[458] The same mode of reception applies to promises to the public—the addressed public is deemed as acquainted with the promise from the moment that the promise is made available to it. If the public is composed by a community of computer scientists, the promise is considered available from the moment that it appears (say) in a computer science magazine, if the public comprises all interested persons, from the moment that the promise appears in the newspaper, website, and so on.

promisor to the promisee. As happens in contract (see 4.1.4.), the thing passes from one party to another directly, without becoming a *res nullius* and without a state mediating.[459]

However, the continuity between disposition and acquisition in promise is, in one respect, even more acute than it is in contract. In contract there is a fraction of time between the reception of the offer and the acceptance or formation of the contract. This fraction of time begs questions like, what is the status of the offeree? Can he effectuate actions other than accepting the offer? In what sense is the offeror bound to her offer? Can she licitly dispose of what she has offered before revoking the offer? What justifies her liability? There is no such lapse in promise. The analogous moment would be the lapse between the statement of the promise and its reception by the promise, but this moment will hardly be relevant from a practical perspective.

(A) IN PROMISE THERE IS NO PLACE FOR REVOCATION

If follows from the previous section that in promises there is no place for revocation. Revocation has a place where the transferee bears something that he has not yet fully acquired. Hence the transferor can say: "Give me the thing back please." When one receives a promise one acquires a credit right, a definite power over a performance. The promisor hence cannot say: "Give me the performance back please." If before the delivered promise arrives, the promisor manages to inform the promisee that the arriving promise is not intended, she will surely not be bound, but not because she revoked. She is not revoking the promise's effects, because the promise never was. The promisor aborted the formation of the promise after having initiated it.

With these developments I believe I have determined inter vivos promises as a means of transferring rights.

5.3.3. THERE IS NO NEED FOR ACCEPTANCE TO ACQUIRE THE RIGHT GIVEN BY PROMISE

Some scholars affirm that a promise that is not accepted does not transfer a right, that the promisee must accept the promise to acquire the right that promise aims at

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[459] It is clear that the thing that the promisee acquires is the same thing that the promisor disposes. For example, if the promisor promises the performance "I will do X" the promisee acquires the performance "You will do X." The identity consisting in that, for both parties, the same person will do X. Obviously the performance is not for the promisor what it is for the promisee. The fact that the promisor sees the performance in the manner; "I will do X," and the promisee sees it as; "You will do X," tells us about the fact that one is obligated to do X and the other has the right to X. But the fact that the performance is a right for one and a duty for the other does not contravene the requirement that the thing that the transferor disposes of must be the thing that the transferee acquires. It rather reinforces this requirement.

transferring.[460] In the previous section I said that what promise needs to transfer a right is reception, not an acceptance; that the promisee must receive and get to know the promise to acquire the right disposed by promise. Here I will demonstrate that acceptance has nothing to do with the act of making promises, and what is more, that promises are by definition unacceptable. So if promise is to be determined as a right transfer interaction, the act with which the acquirer acquires what the disposer disposed must be one other than acceptance.

We must first examine what we mean by "acceptance." In general acceptance represents an affirmative response to a yes or no proposal. There is as much acceptance in the case where A responds, "Sure," to the request of B to promise him something, as there is in the case where A responds, "Great!" to the promise of B to do something for him. However, one can see a *substantial* difference between the two acceptances.[461] The "Sure" contains an act by which the speaker obligates herself to the hearer and the "Great!" contains a piece of information that tells the hearer that the speaker is pleased. I shall name the former acceptance *operative acceptance* and the latter acceptance *mere acceptance.*

Is operative acceptance necessary for the formation of a promise? It is obvious, in my view, that operative acceptance has nothing to do with the social act of promising. The proper place for such acceptance is amongst the constituents of a command. Operative acceptance also makes sense alongside offer and contractual obligation.[462] Of course, amongst the constituents of a contract operative acceptance will imply, in addition to the assumption of an obligation, the reception of a right. Yet in both command and contract, acceptance implies the conferral of a right from the acceptor to the acceptee, a conferral that, if it were present in promise, would convert promise into a purely executory contract.[463] Operative acceptance is to promise what *damnum* is to the systematic composition of offer and contractual obligation. The vacuum left by offer and contractual obligation cannot be filled by *damnum*. These concepts make sense with the concept of

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[460] The classical statement of this view is in Hugo Grotius, *The Rights of War and Peace*, edited and with an introduction by Richard Tuck, Liberty Found, Indianapolis, 2005, Book II, Chapter XI, n. XIV:

> XIV. But that a Promise may transfer a Right, the Acceptance of the Person to whom it is made is no less required here, than in the Case of transferring a Property[…]

[461] Adolf Reinach, *op. cit.*, pp. 29 and ss.

[462] Confirming, in their own argumentative contexts, strategies and languages, J. E. Penner, "Voluntary obligations and the scope of the law of contract," in *Legal Theory*, Issue 2, (1996), pp. 325-357, at pp. 228-230 and Enrico Dell'Acquila, "La promesa unilateral como fuente general de obligaciones," in *Revista de Derecho Privado*, Tomo LXIII, (1979), Madrid, pp. 796-806, at p. 797.

[463] Let me insist on this, both the offeree of an obligation for consideration and the addressee of a stipulation are, by saying the magic word "I accept," assuming obligations—the offeree to give the consideration to the offeror and the addressee of the command to perform the stipulated act.

(operative) acceptance, not with something like *damnum*. In the same sense, operative acceptance is incoherent in the context of promise, chance creation and chance perception—if something else is needed, it cannot be operative acceptance.

So operative acceptance has nothing to do with the act of promise. What about mere acceptance? To repeat, mere acceptance informs the acceptee of the acceptor's present accord with the acceptee's proposal. Can such acceptance be a requisite for the formation of a promise? "I hereby accept your promise" amounts to saying "I do want the promissory right." The question to be asked is this: Do people condition their promises upon agreement of the counterpart? And the answer to be given is a categorical no. One does not ask if the other wants a promise, rather, one makes the promise. Whether the other wants the promise is not a consideration for the efficacy of the promise. It is a matter of consideration for the continuance of the normative change operated because of the promise. If one likes (or simply does not like it, as opposed to dislikes) the promise, one never rejects it, which is like keeping it, not like accepting it.

The denial of a promise is the act of rejection. And it is implicit in rejection that the rejecter has something. One cannot reject or refuse something that one does not have. My refusing the right given by this promise implies that I have, at any time, made that right mine. The possibility of rejecting the right analytically implies ownership over the right. And ownership over the right is in obligations the correlative of bearing the obligation. We henceforth reaffirm that promise causes obligation without the need for acceptance. And having affirmed that promise causes obligation, we reaffirm that irrevocability is essential to promise, for the idea that one can by one's own will decide not to be obligated is contrary to the idea of being obligated. It is the irrevocability of promises that makes mere acceptance insignificant in promise.

In 5.3.2.1 I dealt with the question of how it is that someone acquires a right disposed of by promise. The answer was reception. This answer was a technical determination, the best possible answer to the question: If promise were to be considered a transfer of right, what would be the act of acquisition? (See 4.3.2, especially 4.3.2.2, 4.3.2.4 and 4.3.2.3) This section reinforced such technical determination. We said that acceptance, in any of its two forms, is inessential to the efficacy of (an unconditional, default) promise. Since acceptance is inapposite to promise, and the promisee must do something to acquire the right disposed through promise, reception must be the act of acquisition. The question of whether someone has the right to impose on another the reception of a right presents another quandary. It remains, in other words, to see whether the legal concept of reception resists a normative examination, if for example, it does not contradict the free choice of the promisee. This is a key problem. If reception cannot be recognized as a right

form of acquiring rights, promise must be neglected by private law, for the promisee must somehow acquire the right transfer through promise, and acceptance is inapposite to promise. I discuss the normative issue in 6.1, specifically 6.1.4.

5.4. Requirement three: The promisee must *produce a chance*

5.4.1. The promisee must possess a "bargaining mode of reasoning"

5.4.1.1. The 'bargaining mode of reasoning'

The merit of the Kantian Willkür is to have represented the ancient idea of self-control, voluntas or free will in its minimalist expression.[464] Understood in this minimalistic sense, will—namely Willkür—signifies the faculty to choose by means of one's own mental representations. Capacity of choice implies that a human can refrain from doing what she has been taught or accustomed herself to do in similar situations, and even to resist the urgings of natural impulses—like her sensual desires. It is as if she could stand outside of the chain of causes and effects that determine her as one more object of the natural world. By having capacity of choice, by being able to think for herself, the human is hence able to formulate her original choices for actions, conceive her own projects. It is because of their presupposition of Willkür on the part of humans, I would say, that law and other cultural domains like the creative disciplines can impute ultimate authorship of deeds to humans and not to social contexts or natures. This is what Willkür imports.

The question of how to think in order to choose an action, and of what can be chosen through the mode of thinking that we chose to think with, does not come of pure freedom. The mode of reasoning is not one but as many as one could clearly distinguish and these modes of reasoning are not features of the human's mind but constituents of a culture. This means that humans can learn how to reason in various ways. One could learn how to think as a virtue or Kantian moralist, as a carpenter or skateboarder. These modes of thought, however reducible to categories like practical reasoning or technical reasoning, can be said to be distinct. Although the mental representation of both the carpenter and skateboarder is of the same conditional nature, both carpenters and skateboarders can think of themselves as doing something of their own—for the numerous and sophisticated rules of one has little of the numerous and sophisticated rules of the other.

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[464] I take the notion from Immanuel Kant, The Metaphysics of Morals, Mary J. Gregor translation, Cambridge University Press, Cambridge, 1996, 6:211-6:221, pp. 373-376, Peter Benson, "External Freedom According to Kant," in *Columbia Law Review*, 87, (1987), pp. 559-579 and Ernest Weinrib "Law as a Kantian Idea of Reason," in *Columbia Law Review*, 87, (1987), pp. 472-508. I might have departed from the treatment given by these authors. I quote them because they inspired the idea developed in the text.

It is in this context that I propose that you think that the promisee, prior to and after the acquisition of the promissory right, possesses what I call the "bargaining mode of reasoning." This intellectual thing serves to choose transactions and it can be used as many times as its owner desires for the purpose of assessing choices for bargains. I will refer to it indistinctly, but there are as many bargaining modes of reasoning as the researcher could distinguish. For example, one could argue that some people are well trained in choosing promises of goods for shopping. They consider factors like price/quality, satisfaction, social responsibility, status, etc. They have a "consumer's mode of thinking." The interested promisor will implement it (reason like a consumer) at the time of ideating the promissory obligation (see 5.2.2.2 (b)), and the promisee-consumer at the time of receiving the promise. Another example is the "constructor's mindset." His reasoning also assesses contract options, but for doing business, and so other factors will be considered, like the transference of risks, margin of gain, professional credit and prestige, etc. The addressees of a reward and of prize promises may have their own modes of reasoning.

5.4.1.2. THE BARGAINING MODE OF REASONING BELONGS TO THE PROMISEE

It would take too long to discuss the reasons I have for thinking that promisees can be thought of as owners of a bargaining mode of reasoning. Let us just accept some propositions. First, the bargaining mode of reasoning consists of an intellectual thing, a concept that serves a distinct function in an ascertainable community of sense. Second, it is susceptible of being acquired by persons—humans can apprehend it, make it theirs through education, or not.[465] Finally, humans use their bargaining mode of reasoning to the exclusion of others. Even if everyone can easily access this good, each person has their own and each one's usage of it brings results that differ from the results or uses of others. So, the promisees that the interested promisors appoint with their promises are persons who have acquired a bargaining mode of reasoning.

Now let me examine some features of the bargaining mode of reasoning. First, the bargaining mode of reasoning is a productive thing. It is a productive thing in the sense

[465] You could not have this mode of reasoning and be a perfect legal person. Think of the Arab bargaining culture. Arabs do compare choices for transactional action, however the comparison does not take place in solitude. Their bargaining process requires of a co-present will, which is modifying and re-modifying the terms of the choices. No choice is truly deemed definitive to an extent that, from the Western perspective, the bargaining process turns to be everlasting, uncertain and unbearable. In this scenario, a promisee cannot say that he has been induced by the promisor to create a chance for the promisor. The promisor could obviously say that the promisee could have never taken the promise as a definitive choice for action. So, once again, the promisee must own the mode of reasoning.

that the function that distinguishes it from other ideas produces objects of their own.[466] As the tree produces fruit, or the letting of a house rent, the bargaining mode of reasoning produces deliberations (which can be thought of as chances, see 5.4.3.1). These objects are distinguishable from the thing that produces them. Second, the bargaining mode of reasoning is an incomplete thing. To show the character that distinguishes it from other things or concepts, this or that bargaining mode of reasoning needs to be complemented by something else. Even if the promisee possesses the bargaining mode of reasoning as a thing standing on its own, this thing is not realized—it does not come into being—unless and until it is set into motion, unless and until it bargains between choices. As a math formula needs quantities to be itself, the bargaining mode of reasoning needs qualities, choices that excite it into deliberatation. Finally, the bargaining mode of reasoning is an inconsumable thing. Since it is like a skill, the bargaining mode of reasoning can be put to use as many times as its bearer can and wants.

5.4.2. THE PROMISEE AS INDUCED TO PUT HER BARGAINING MODE OF REASONING INTO ACTION, CREATING A CHANCE

Let us go back to the transaction. It is time to explain how the promisee produces the chance.

5.4.2.1. THE EFFICACY OF THE INDUCEMENT

An interested promisor contemplates three orders of fact about the promisee that she appoints with her promise.

First of all, she knows that the promisee is committed to being *a private law person*; he will gain awareness and appraise the notifications, offers, promises and other communications he may receive.

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[466] German Civil Code says in relation to fruits:

> §99 [Fruits] (1) Fruits of a thing are the products of the thing, and other yield derived from the thing consistent with its purpose.
>
> (2) Fruits of a right are the proceeds which the right affords, consistent with its purpose, in particular, in the case of a right to extract component parts of the earth, the component parts so extracted.
>
> (3) Fruits also include the proceeds which a thing or a right affords by virtue of a legal relationship.
>
> §100 [Emoluments] Emoluments are the fruits of a thing or a right as well as the advantages which the use of the thing or right affords.

I utilize The German Civil Code, Revised ed. as amended to January 1, 1992, Simon L. Goren translation, Rothman & Co., Colorado, 1994.

Second, she knows that the promisee *has a bargaining mode of reasoning* that he shaped, disciplining his capacity for choice in a specific mode.

Third, she knows that the promisee *possesses an infinite number legal choices for action*, like the right to rest in the public space, the privilege to make offers to others, and so on and so forth.

On these bases, the promisor can be sure of the following *three facts*:

First of all, the promisee receives the promise. As the promisee is a private law persona, someone who not only has rights as against others but also responsibilities, the promisee is someone who cares about the communications, invitations, promises, offers, etc. that others make to him. So when the promisor declares a promise to the promisee the promisee must listen to the promisor and take her seriously. If the promisor promises in a letter, she can be sure that the promisor will check the mailbox, read the letter and understand the right conferred in it. So when the promisor makes him the promise, the promisee acquires or gains awareness of the promissory right.[467]

Second, the promisee applies his bargaining mode of reasoning. The promisee is not a random person. He is someone with a bargaining mode of reasoning. No one who understands that what he is reading is a promise will not consider, at least for a second, whether he is interested in the right or not. The promisee applies the bargaining mode of reasoning—he evaluates the desirability of the promissory right or compares it with the other comparable choices he has.

Third, the usage of the bargaining mode of reasoning indicates to him that the choice of the newly acquired right comes with the rejection of preexistent choices. Let me explain this point with an example. The promisor makes a promise of a reward and the promisee receives it, acquiring a conditional right to a reward (see 5.2.2.2(c)). If he decides to perform the act conditioning his entitlement to the reward, the promisee will have to (let us assume) spend the whole evening looking for the lost cat (choice A). But he could choose to exercise another entitlement of his. He could, for example go to the park and rest, which will also take him the whole evening (choice B). Since all possible promisees possess choice B and it is impossible to perform choice A and B simultaneously, we could

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[467] From a different angle:

> How do we know that an offeree *has* given the offeror the chance that the offeror was bargaining for? Usually in firm-offer cases, the issue of enforceability only arises when the offeree wants to accept the offer. Therefore, it can fairly be presumed that by making the firm offer, the offeror has induced just the consideration of his offer that he sought.

Melvin A. Eisenberg, "The Revocation of Offers," in 2004 Wis. L. Rev. 271, (2004), at 285.

be sure that the promissorily placed choice conflicts with at least one of the choices that the promisee possesses.

Now, if we agree that a chance is a possibility that a hypothesis of a fact occurs in the place of a contrary hypothesis, and that the usage of the bargaining mode of reasoning puts the possibility forward that the promisee may choose the promissory right instead of a contrary right that he cannot but possess, then we must conclude, without uncertainty, that the usage of the bargaining mode of reasoning creates as it were, a legal chance. Once again, as the promisee will always receive the promise, apply his bargaining mode of reasoning and consider choosing the promissory right instead of an incompatible choice that he certainly has, the promisee will, without uncertainty, always produce the legal chance (See more in 5.4.3.1).

We can refer to the fact of the chance production as "chance causation."

5.4.2.2. IT IS THE *PROMISEE* WHO PRODUCES THE CHANCE

True, the promisee would have not evaluated the promissory choice had the promisor never submitted it. But the chance determination act is performed by the promisee alone. He is who takes the right in, compares it with his other rights and produces the chance. So the actor in relation to the chance-causation act is the promisee.

5.4.2.3. THE IRRELEVANCE OF RELIANCE

Reliance on the promise is not a prerequisite for the causation of the chance. Reliance considers the relationship from the moment that the promisee commences to perform the act requested in the promise, like beginning to look for the lost thing, preparing himself for the contract, and so on. What I am suggesting here is that the relationship deserves consideration from the moment that the promisee receives the promise. The reason for this is that the benefit that the promisor sought when she made the promise became a fact with the reception of the promise. If the interest of the proponent were not the chance of having her lost dog back but the fact of having the dog back, then the moment from which the relationship causes an obligation is the moment in which the addressee brings the dog back, when the offeree accepts the offer. So if the reliance requisite is one step ahead of the requisite causation of the chance, the reliance requisite is one step behind the requisite acceptance of an offer of a unilateral contract. To be sure, I cannot imagine a case where a person is interested solely in the fact that another person begins to do something.

In this drawing we see the four stages of the formation of a unilateral promise. In number one we see the promisor planning and making the unilateral promise to pay a reward to the finder of his lost dog. We see in his message that the promise is not a simple promise but one of those made to induce promisees to create a chance for promisors: on the one hand, the promisor and his promised money; on the other hand, the act that conditions the promise; below, the intended addressees of the promise. In number two we see a promisee receiving the promise. He is not accepting it; he is just learning (apprehending) it. We can see that the promise caught his attention. In the third moment we see the same promisee considering the promise. Do I put myself to look for the lost dog, or perhaps to play basketball, or just ride my bike? These choices compete against each other generating possible world scenarios. One of these is the chance that he chooses to do what the promisor wants, in exchange for the reward. Finally, we see the promisor getting the chance's value.

Now suppose that the promisor sends a revocation letter to the promisee and the promisee reacts by alleging violation of the promise. The promisor cannot say that the first act on behalf of the promisee occurred after of the revocation. No, the first deed of the promisee did not consist in demanding performance of the promisor. The first deed of the promisee, what caused the chance that the promisor perceived, was the reception of the promise.

5.4.3. THE CHANCE AS A THING *IN COMMERCIUM*

We saw that when the promisee receives the promissory right *and* evaluates it in relation to incompatible or alternative legal choices, the promisee creates something that had not existed before. This something, again, is what we have called "the chance"—the actual possibility that the promisee choses to act as the promisor wishes. I want to give special attention to the chance. The following topography is aimed at making it clear that the chance, the thing that the promisee produces and the promisor perceives, is something with a *significance* and a *reality* of its own, distinct to both the promissory right and the bargaining mode of reasoning. Eventually, I will argue that this thing of its own has a pecuniary value.

5.4.3.1. THE THING I CALL "CHANCE"

We could define chance as the hypothesis of a fact that is more than possible in a given world. Let me develop briefly. That we talk while we swallow can be said to be impossible in this world. That we swallow what we eat can be said to be certain in the same world. Whatever is neither certain nor impossible in a world is said to be possible. That we discover the way to eat and not get fat could be considered possible today. That I will eat tomorrow is however more than possible. This is more than possible because the considerations that made us reach that conclusion are more convincing than the considerations that made us reach the former conclusion. Humans have invented the wheel, the internet, innumerable obscenities, why wouldn't they invent food that never fattens? This seems to be convincing. But what about this: I have been eating every day of my life, I am 29 years old and people with my lifestyle die in their 70's. Furthermore, I have the money to eat tomorrow and live in a country with plentiful goods and a stable economy. It is more possible that I eat tomorrow than that we ever find a way to eat without getting fat.

Now, chance can have a double existence. One is in the form of a psychological reality and the other is in the form of a reality outside of the mind. Let us firstly examine what happens in the mind of someone receiving a unilateral promise. When the promisee opens the email, reads the promise and grasps its meaning, the promisee receives a promissory

right. Hence, in the promisee's mind there is a new choice for action, a new project on which the promisee can embark (decide to make the contract, look for the lost dog, claim the gift) and benefit therefrom (acquire the service, possibly get the reward, take the gift). However, this is not his only choice for action. He has other choices, some of which are realizable through plans that are in conflict with the plan involved in the realization of the promissory choice. (The promisee cannot rest at home and look for the lost dog, deliver the same service to two subcontractors and so on and so forth). Now, the reception of the promise entailed the evaluation of its desirability. No one who understands that what he is reading is a promise will not consider, at least for a second, whether he is interested in the right or not. The placing of the new choice in the bargaining mode of reasoning calls to mind the most obviously incompatible choices, for no one can evaluate a choice without alternative choices. So a conflict of choices is produced. The promisee will compare the promissory choice with those choices beholden to contradictory projects, once and again. Here is where the chance appears. In making its own place, the newly placed right displaces, pushes outward as it were the contradictory choices, and from their prior position the contradicting choices resist, bouncing against the newcomer. [468] The tension produced where each choice exercises its rhetorical force against the others resembles a chance scenario, one where there is the possibility that one hypothesis of a fact defeats the contradicting others in its coming into being. This is what I call the chance in the psychological sense. I make *reference* to a process happening *in the promisee's mind*.

Now let me talk about the chance as it exists outside of the promisee's mind. Someone, most probably a merchant, must have realized that a specific type of promise has the power of inducing persons to want to do things with a remarkable degree of effectiveness. I imagine that in business schools teachers teach techniques for making very attractive proposals, proposals whose rhetorical power excludes competing proposals or create the need for its offer where previously no need existed. The result of those proposals is what I have called the chance. And I would add that the chance is a cultural reality because people can pick it up from a community of sense and apply it to specific purposes.[469] Its

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[468] Interestingly, scholars in the field of marketing studies talk about the "public and mental space" taken by advertisements. Noemi Klein, *No Logo: Taking Aim at the Brand Bullies*, Picador USA, New York, 1999, p. 340.

[469] Obviously the concept of legal chance can also serve a third impartial party who wants to analyze the promisor-promisee relation. Before the promisee received the promise, it was almost impossible that he would begin to search for something he most likely ignored was lost. With the reception of the promise, he began to know that an object of X and Z qualities is lost, that the object belongs to Y and, more importantly, that he will be rewarded with $N if he happens to return it. That he may decide to embark himself in the search is a new hypothesis of fact in the promisor-promisee world, and any well-informed judge can tell. Before it did not exist, now it does. It may be less probable than another,

original and also most conventional application is the satisfaction of a civil and commercial need. The chance satisfies my need to increase the possibilities of having something that I cannot obtain in a market place. I cannot go to a market and buy my lost dog, I cannot buy consumers nor can I buy good partners with whom to work. Yet I do can promise things that may induce others to look for my lost dog, consume and become consumers of my products or test me as a working partner.

What I do hence is endeavour to increase the possibility of a thing I cannot buy becoming mine. In this, the chance is something that serves the promisor, but as I am trying to elaborate here, the chance can serve to the promisee as well. Clearly, the promisee does not apply his bargaining mode of reasoning to create the chance. He applies his bargaining mode of reasoning to make the most convenient choice. He is indifferent towards the chance, it has value only for the promisor. And it will serve only the promisor if the promisor behaves as she promised. However if the promisor violates the promise—this is my argument—then the chance can serve the promisee as well. The promisee can utilize the chance to oppose it as the object of a conferred right. Thereby another signification for the chance: It is the object of a specific subjective right. I will come back to this in 4.3.3.2 (d.1).

5.4.3.3. IT IS DIFFERENT TO THE RIGHT AND AN EXTERNALITY OF THE MODE OF REASONING

The chance distinguishes itself from everything around it. It is neither reducible to the bargaining mode of reasoning nor is it reducible to the promissory choice—the promisor's fruit is neither its source nor the personal right that excites it.

Firstly, the chance cannot be confused with the bargaining mode of reasoning. Whereas the chance refers to the interplay between the promissory choice and a preexisting group of contradictory choices, the bargaining mode of reasoning refers to the platform where this interplay takes place. Each concept has a function of its own (compare 5.4.3.1. with 5.4.1), and the bargaining mode of reasoning preexists and subsists on the chance created with the reception of a promissory right (see X). Like the let of an apartment, the chance is attributable to, but yet detachable and distinguishable from its source. Indeed, the main function of the bargaining mode of reasoning is not to produce chances but right choices. The chance is an externality of the choice making process.

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contradictory hypothesis of the same world. Yet the possibility that the promisee happens to do it is there, biting, as it were.

The chance should also not be confused with the promissory right. True, the promissory right partakes in the creation of the chance. It is one of the many choices the evaluation of which produces the chance, but it cannot be confused with it. The difference could be better viewed in consideration of their legal functions: Whereas the promissory right is to juridically impoverish the promisor, the right over the chance is to juridically enrich her; the same thing cannot enrich and impoverish you in the same sense. The chance is not the promissory right but the product of the promissory right's interplay with other practical choices.

5.4.3.2. THE CHANCE IS *IN COMMERCIUM*

For a thing to be the object of a transaction in private law requires, firstly that it not be excluded from commerce and secondly, that it be susceptible of pecuniary appreciation. Should private law prohibit transactions whereby persons induce others to give them the value of a chance? This is the question addressed in 6.2. Here I address the second requirement.[470] So, is the chance susceptible of pecuniary appreciation? This question can be answered both empirically and theoretically. The risk of answering the question only empirically is that if we find no chances in commerce we will have to conclude that chances are insusceptible to pecuniary appreciation without having considered if they could be susceptible to pecuniary appreciation. I want to eliminate that risk.

Theoretically, a thing can be analyzed quantitatively and qualitatively.[471] The qualitative consideration goes to the needs that the thing that is the object of analysis is regarded as serviceable for. As Professor Weinrib illustratres: "I can make use of my shoe, for example, because my shoe has certain qualities: a concave shape into which my foot fits, a flexible material that will bend as I lift and lower my foot, a slightly curved sole that facilitates locomotion, and so on. Only with such qualities can the shoe satisfy the needs of movement and protection that the shoe serves."[472] The need, or better, the interest that the chance serves is, in general, our will to develop our civil or professional personality, and in particular, our will to have the possibilities of having something we cannot buy increased.

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[470] The requirement can be inferred from the rule according to which private law remedies must be translatable into monetary terms.

[471] In this I am inspired by Weinrib's interpretation of Hegel in, *Corrective Justice*, Oxford University Press, Oxford, 2012, Chapter 6, number 2, p. 190 and ss.

[472] Ernest Weinrib, *Idem*, p. 191.

The quantitative consideration makes two movements. Negatively, it abstracts from the needs that things conventionally serve, and positively, it relates one such "denaturalized" thing to another through an equalizer. This equalizer looks like a norm saying "X units of shoes equals Y units of loaves of bread." We effectuate the quantitative consideration because we want a means to compare qualitatively incomparable things. Indeed, the need that shoes serves (call it "ambulatory comfort") cannot be compared with the need served by loaves of bread (call it "nutrition").[473] And we want to render these two incomparable things comparable because, for example, the baker may want to know how many loaves of bread she should give in exchange for a pair of shoes. The quantitative consideration, to make it short, is one of the representational systems that make up markets.[474]

The time has come to answer the question: Can the chance have a pecuniary value? This question has nothing to do with the intrinsic qualities of the chance, nor has it to do with the function that people give it. It has to do with whether the chance is comparable with a qualitatively incomparable thing through monetary quantities. The question that matters is whether someone could ever exchange the chance for a thing with pecuniary value. So the answer is yes, theoretically, the chance can have a pecuniary value.[475]

Now let us formulate the empirical question: Does the chance have a pecuniary value? Once again the answer is yes, it does. The chance does have a monetary value. This value is given whenever persons say things like "I promise €9000 to the person who finds my dog, and I firmly promise that I will not revoke the promise." In doing this, the promisor is giving monetary value to the chance.[476] In this case, the pecuniary value of the chance

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[473] *Idem*, p. 192

[474] We find quantitative consideration in many other situations, like the competition for the best dog. How can we say that X is the best dog if the competitors are dogs of a different kind? If the dogs in competition were of the same kind, it would be possible to use the quantitative analysis. We assume that all dogs manifest a set of qualities and then we evaluate which one dog manifests the set of qualities better. But the competition does not assume that all dogs manifest the same abstraction "dog." They assume that dogs manifest different kinds of dogs, and this assumption excludes the possibility of qualitatively considering that a dog of one kind is better than a dog of a different kind—for each one dog manifests a different set of qualities. The problem is nevertheless solved. In a first round the dogs of the same kind are evaluated under a qualitative consideration. In a second round the winners of the first round are evaluated under a quantitative consideration. The judge must estimate in a scale of 1 to 10 how much a dog manifests the perfect representation of the kind of dog she is. So if Camila is better than Zinia it is because Camila is a 9 as Cocker spaniel and Zinia an 8 as an Irish Setter. (Here I draw from a paper on legal decision making by Bruce Chapman called "Incommensurability, proportionality and defeasibility" presented to the EUI Legal and Political Theory Working Group on Wednesday 21th of November 2012 in Sala Triaria, European University Institute, Florence.)

[475] So literally everything could have pecuniary value. It suffices for someone to be interested in acquiring it for money or for something with monetary value. The chance is given pecuniary value whenever someone acquires a chance in exchange for something with a monetized value.

[476] The monetary character of the thing the chance is exchanged for is, as it were, transmitted to the chance.

is the difference between the money value of the €9000 by the time of the claim and the market value of the dog (we must assume that the promisor has lost ownership!), plus the work it could take to find it. The next, intuitive question is this: Is there a market for chances? Studies on the role of chance and probability in contract law inform us of many markets for chances and report cases where courts use such markets to assess damages for the breach of contracts.[477] These markets are not quantifying the chances we are dealing with in this work, but then this is not a theoretical impossibility... So we conclude with two answers. First: Yes, chances can and do have a pecuniary value. Second: The empirical non-affirmative to the question "is there a market for chances?" does not imply the theoretical negative.

5.5. Requirement four: The promisor *perceives the benefit of the chance*

5.5.1 The fact of the chance's benefit perception

As the promissory choice reaches the promisee and makes him use his bargaining mode of reasoning, a choice competition begins, where the promissory choice is compared with incompatible or contrary choices. Thereby a chance arises; the possibility that the promisee happens to choose the promissory choice and not the other conflicting choices. This chance is not something that the promisee produces for his interest. He may prima facie be uninterested and even unaware of the chance-causation fact. The promisee produces the chance for the benefit of the promisor. It is the promisor who benefits from the existence of the chance. I want to suggest that as the promisee produces the chance, the promisor perceives, takes possession, as it were, of the chance's benefit.

The best way of saying that the promisor is in control of the value of the chance is to say that the promisor is the immediate beneficiary of the chance produced by the promisee.

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[477] Melvin A. Eisenberg, "Probability and Chance in Contract Law," in UCLA L. Rev., 45, (1997-1998), pp. 1005-1076, at p. 1048 and ss. It is interesting to see Eisenberg's notes on the question of measuring the damage for breach of promise:

> The best approach is to use market value. In cases like lottery tickets, in which there is an established market for the chance, market value should be measured by the market price. When there is no established market, market value should be based on the price that a willing buyer would pay to a willing seller. This approach was implied in the opinion of Lord Justice Vaughan Williams, concurring in *Chaplin v. Hicks:*
>
> > It is true that no market can be said to exist. None of the fifty competitors could have gone into the market and sold her right; her right was a personal right and incapable of transfer. But a jury might well take the view that such a right, if it could have been transferred, would have been of such a value that every one would recognize that a good price could be obtained for it.
>
> Typically, in the absence of a market price, what a willing buyer would pay a willing seller will be based on the expected value of the chance.

Idem, p. 1051.

We have explained this point from different angles in 1.1.3, 4.3.3.1, 4.3.3.2(d.1.), 5.2.2.1, 5.4.2.1 and 5.4.3. Certainly, a third party could benefit himself from the created chance as well, but we will see in 5.6.3.2(a) that third parties have a duty to regard promissorily created chances as a value for the exclusive enjoyment of the promisor.

One must also notice that if the promissorily placed choice is effective enough to convince the promisee to reject other choices by choosing it, then the promisee will in some sense have chosen what the promisor wanted. It would be far-fetched to argue that the promisor gets into the promisee's mind to exercise control over the choices that involve plans contrary to the plans demanded by the promissory choice. Yet, the choice she made the promisee receive is in the latter's mind, competing with his preexistent choices…

I must connect this section with 5.4.2.3: the moment the promisor perceives the chance is the moment where the promisee receives the promise and creates the chance, there is no need of reliance on the part of the promisee. The reason for this is precisely that the benefit that the promisor sought when making the promise became a fact with the reception of the promise—the benefit arose as soon as the promisee engendered the expectations. Reliance theorists pay no attention to the interests of promisors, and thus they miss the opportunity to make a good argument. They just focus on the losses of the promisee. No one, let alone reliance theorists, seems to have noticed that some promisors give credits to others because credit-giving benefits them. The unilateral promise does identify the interests of interested promisors.

5.5.2. The chance perception as the acquisition of a right (the ius in re aliena)

So the promisor in fact perceives the benefit of the chance. The question is: Has she a right over it? The answer is yes; the promisor owns the benefit of the chance as someone who owns the fruits of the thing of another.[478] The chance is in the mind of the promisee and, if someone can dispose of it, that must be him. However, the chance does not serve him. Indeed, insofar as he does not want to claim the promissory right he will never think of talking about the chance. But the chance does serve the promisor, and so she has a right to its fruits. He has a right to its fruits because and exactly because, if she ever wants to neglect the promise, the promisee will be able to point the chance as the thing he gave in exchange for the right he acquired. The promisor owns the benefit created by the promisee so that the promisee owns the performance disposed by the promisor.

[478] See 4.3.3.2(d)-(h), specially (g).

Am I saying that the right of the promisor exists so that the promisee has title to oppose to her attempt to revoke the promise? No, I am not saying that. What I am saying is that the value she perceives when the promisee receives the promise obtains the nature of a right because of her decision to commute it for a promissory right. I am saying that the quality of the value she gave to the promisee is transmitted to the value that the reception of the promise made the promisee produce for her. Another question relates to the implications of the *ius in re aliena*. As we will see, the implication of the right over the benefit of the chance is two-fold. As against any possible person, the promisor is the only one entitled to benefit from the chance. If another enjoys the chance without his authorization, the promisor accrues an action for the recovery of the lost profit. In addition, the form of a right to enjoy a chance serves as a shield for defendants who were falsely accused of making a unilateral promise.

(A) THE CHANCE IS ONLY A POSSIBILITY: IT DOESN'T MATTER IF IT NEVER WAS

Barry v. Davis is a case of a promissory advertisement. The defendant had promised to sell a lot without reserve and, in view of the fact that the best bid was derisory, he tried to revoke the promise. The court held that the revocation was ineffective, for there was already an obligation. The consideration for the obligation was in the form of a chance for the promisor, for he promised with the clause "without reserve," knowing that "attendance at the sale is likely to be increased if it is known that there is no reserve,"[479] (See the discussion and critical review in 2.2).

The fact to be highlighted now is that only one person attended the auction—the highest bidder. In other words, of all the persons that the auctioneer entitled with a right to bid for the lot, no other promisee, besides the plaintiff, attended the auction. This case shows that it is immaterial whether the ultimate goal of the promisor—e.g. to sell the lot at a good price—happens to take place, it suffices that she acquired the chance. The chance is a valid consideration even if it was miscalculated, even if the thing the promisor ultimately wanted never happened to occur.

5.6. THE PROMISSORY RELATION

5.6.1. THE PROMISSORY RIGHT AND THE *IUS IN RE ALIENA*

The unilateral promise implies two correlative transfers of rights. On the one hand, the promisor disposes of a performance of her own so that the promisee acquires it, and on

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[479] *Barry v Davies (t/a Heathcote Ball & Co)* [2000] 1 W.L.R. 1962-1969 (CA (Civ Div)), at p. 1967, H.

the other hand, the promisee uses his mode of reasoning to produce a benefit that the promisor perceives. There is, in other words, a perfect commutation. But the commutation of the unilateral promise is not like a manual contract, where the two parties take possession of the thing-objects of the commutation. The unilateral promise causes an obligatory relationship, where not only the promisee owns something that the promisor has not yet given. The benefit to the promisor is also in suspense. The chance lives in the mind of the promisee and, as we will see, others can exclude the promisor from its advantage. This section will study the implications of the promissory relationship.

5.6.2. IMPLICATIONS OF THE PROMISSORY RIGHT

The promise has given a credit right to the promisee, which I have named "promissory right." What are the implications of the promissory right?

5.6.2.1. AN ACTION FOR THE PROMISEE

The promissory right entitles the promisee to the performance obligated of the promisor, which means that the promisee can count on the performance for planning his civil or professional life. So, for example, the promisee can look for the lost thing with the assurance that the reward will not be revoked, that the only risk he runs is that he never finds the thing or another finds it before him. Or the contractor can count on the service and prize promised when constructing a general offer. He is assured that after the acceptance of the offer the promisor will not change the price of the promised service.[480]

Typically, the promisor may attempt to revoke the promise. The legal position of the promisee permits him to demand the promisor recognize his right and continue acting as if the promisor had never neglected her obligation. In other words, the promisee can demand that the promisor act in accordance with the promise. Another case may occur where the promisor begins to act in ways that indicate that she will not be able to perform the obligation. For example, she promised a contract to be effectuated in July 2016 and, before the end of 2015, a rumour that she is closing the company begins to circulate. This

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[480] We could add what López de Zavalía said of credit rights in general; "It seems exaggerated to limit the protected interest in a mode such that it be conceived as if it could only be satisfied by the complied performance by the debtor… during the time of expectation there certainly fit conducts of enjoyment of the credit before the payment and before of all type of violation. The creditor can do more than wait, and in particular, he can enjoy of his right making it value as an active of his assets, with all the consequences that that has as against third parties, included also the debtor. Think that, to whom not being a creditor calls himself thus there are declarative actions, from which we conclude that in the claim of creditor by who he is not there is an attitude of enjoyment of the active position—we would mutilate the credit if we reduced it to pure expectations, denying the aspect of wealth that it provides to the creditor." *Derechos Reales*, Zavalia, Buenos Aires, 1989, t. 1, §3, p. 51.

would be a case of "breach of promise" or non-performance of the promissory obligation. If it is clear that there will be no way to make the promisor come to terms with the promise, the promisee can claim compensatation for his frustrated expectations (See below (B)).

5.6.2.2. Some words on the modes of extinction of the right

Let me develop some thoughts on the modes of extinction of the promissory right. The right of the promisee is typically extinguished by performance, non-performance, expiration and rejection. Other modes of extinction may be applicable.

(a) Performance

Performing a promissory obligation can be understood in two senses. In one sense, it implies that the promisor does not neglect the promise nor performs acts that would hinder its due performance, like disposing of the promised service, prize, etc. In a second, and I would say stricter sense, performance means that the promisor gives, does or does not do what she has promised. If the promisee returns the lost thing and claims the reward, the promisor pays the reward; if the promisee claims the promised contract, the promisor gets ready to effectuate the contract, and so on and so forth.

Is the duty to perform compensatory? Eisenberg asks this question in the context of promises of prizes, noticing that "Although the benefit a promoter gets from the contest winner is typically only an infinitesimal fraction of the contestant's prize, the promoter will set the amount of the prize at no more than the benefit he expects to derive by running the contest. Accordingly, while the overwhelming proportion of that benefit will flow from persons other than the contest winner, requiring payment of the prize will not result in a net loss to the promoter, at least as he calculated costs and benefits ex ante."[481] From this it follows that "the best explanation for the expectation measure is not that it is compensatory, but rather that it provides the right kind of incentives to contracting parties and, therefore, is the measure that contracting parties probably would have adopted if they had addressed the issue of damages."[482]

I hold a different view. The pertinent consideration is not whether the promisor pays more or less what the promisee expended in participating and winning the competition, what determines if the prize is compensatory or not is whether the promisee gave

[481] "Probability and Chance in Contract Law," in UCLA L. Rev., 45, (1997-1998), pp. 1005-1076, at p. 1047.

[482] *Idem*, at 1045.

something for acquiring the prize as a right. In the promise of a prize the candidate acquired a right to participate in a game and win a prize and the promoter a right to enjoy the chance that the candidate may participate in the challenge. There would be an imbalance if the candidate wanted to participate in the game and the promisor did something to prevent it, or the candidate won the challenge and the promisor refused to pay him the prize. The promisee would have given a right to enjoy a thing created by him, and not received the thing in return for which he gave such right. The prize would be compensatory in the sense that he would have the thing that has belonged (as a conditional credit right) to him since the promise of a prize.

(B) NON-PERFORMANCE

If it is clear that it makes no sense to keep promisor and promisee in a promissory relationship, then the promissory obligation has been unperformed. For example, the sub-contractor promised a contract to be effectuated in July 2016, and before the end of 2015, a rumour begins to circulate that she is closing the company—firing workers, selling working tools and so on. Here it makes little sense to pretend to hold the promisor to her promise. The obligation is extinguished by non-performance and the promisee perpetuates his right in an action of compensation for his frustrated expectations.

(C) EXPIRATION

Expiration also extinguishes the obligation. The expiration date could be established by the promise itself or, in the event of defect, be given by the circumstances. Positive laws fix terms like 2, 5, 10 years, depending on the case. I am talking about the so-called prescription or set off. These norms are fair. It would not be reasonable to keep someone obligated for more than, for example, 2 years after that she made the promise.

(D) REJECTION

Rejection occurs where the promisee communicates to the promisor that he is no longer interested in the promissory right. Rejection plays an important role in the justification of the unilateral promise. As we will see in 6.1.4.2.1, the possibility to say "No, I don't want this right" is what counterbalances the fact that the promisee never actually chooses to have the unilaterally transferred right. But rejection poses a technical problem. The rejection of the personal right by the promisee does not only imply that he is no longer owner of the personal right but also that the promisor no longer owns the benefit of the chance. For saying; "I don't want this right" amounts to saying; "I am no longer considering whether to choose it," which in other words, extinguishes the chance. The question hence

emerges: How can the promisee dispose of something of the promisor? We revisit this question in in 5.6.3.

(E) IMPOSSIBLE PERFORMANCE

Complying with the promise is no longer possible, and the promisor has incurred no fault. For example, someone promises a prize to the person who discovers the formula to do Y. After some months, it becomes public knowledge that Z University discovered how to do Y. Many independent researchers were looking for the formula with a view to obtaining the promised prize. Z University, instead, discovered the formula independently; it never knew of the promise. The promisor is no longer liable as against the community of researchers to which she made the promise because the condition that they were expected to perform has become impossible to perform. This extinguishes their conditional right and, as a consequence, the correlative duty of the promisor.

(F) UNILATERAL CANCELATION OF THE DUTY

Some situations would permit promisors to unilaterally cancel their duty. For example, I offer to sale 1kg of beef for the price of €10 and I say not that I will keep the promise until stocks are exhausted, but that I will keep the promise open for a year. Two months later an unpredictable event makes the price of the meat rise three times more than the price it had been making at the time I made the promise. It is fair that I have the power to unilaterally cancel my duty. This would be a typical case of just cancelation of a promissory obligation, and one could imagine other situations.[483]

The just cancelation—what one may improperly call just revocation—must be made in the same way as the promise.[484] If I made the promise appear in X newspaper, three times a week, for a month, I have to employ the same means and intensity to communicate the just cancelation.

(G) OTHER MODES

The above-noted modes of extinction are the ones that will most typically apply to unilateral promises, however other modes of extinction of obligations could also extinguish the promissory obligations. For example, promisee and promisor could novate the right to make a contract. But novation does not seem to be relevant to all cases. It is

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[483] See Mariano D'Amelio, "Delle promesse unilaterale (Art. 1987-1991)," in D'Amelio, Mariano and Enrico Finzi, *Codice Civile, Libro delle Obligazioni, Commentario*, vol. III, Barbèra, Firenze, 1949, pp. 11-12.

[484] Italian Civil Code, Article 1990 *in fine*.

difficult to imagine promisor and promisee novating the obligation arising from a promise of a reward.

5.6.3. IMPLICATIONS OF THE *IUS IN RE ALIENA*

Receiving the promissory right has induced the promisee to produce a benefit for the promisor. The promisor owns the benefit of the chance as someone who owns the emoluments of the thing of another. He has a right over the benefit of the chance. What are the implications of this *ius in re aliena?*

5.6.3.1. A DEFENSE AGAINST FALSE ACCUSATIONS

To start with, the form of a right to enjoy a chance serves as a shield for defendants who are falsely accused of having made a unilateral promise. This defense can be invoked in two scenarios, firstly the case of a bare promise, and secondly, the case of an offer with promissory content. So assume first that the claimant received a promise that, according to the dominant commercial practices, the promisor could have not made with a view to acquiring a chance. These are cases of promises among relatives or friends, or every case in which it is clear that the interest of the promisor is to do charity to the promisee. To the claim of the promisee, the promisor can say, "True I made you a promise, but as I got nothing in exchange for the promise, the promise is not enforceable in private law. You may say that I am a bad guy, or that with this I ruined my credit, but you cannot say that I acted unjustly, for I never received a right from you." [485]

Suppose now that one receives an offer and claims to have received a unilateral promise. The case becomes more interesting where the offer that one received is one whose content is typically proposed by means of unilateral promises. To illustrate, promises of reward are typically made via unilateral promises, but nothing prevents someone who wants to recover lost property from simply offering a reward for the found item. To the offeree then it must be clear that the proposal is revocable at will, that the only way in which he can accrue a right against the offeror is by returning the lost property. And if the offeror revokes and the offeree opposes argument against such revocation, the offeror can

[485] Richard Posner analyses this case in the terms of "costs of legal error." It is about a "mistaken or dishonest "promisee" who imposes on his "promisor" the costs of defending a groundless suit, at the same time incurring litigation costs of his own which have no social value either." Interestingly, the judge should decide to not enforce the promise if she finds that the "costs of legal error" and the other "enforcement costs" are greater than the social utility of enforcing the promise, "Gratuitous Promises in Economics and Law," in *Journal of Legal Studies*, vol. 6, (1977), pp. 411-426, at p. 415.

say: "As I never stated my proposal in words that suggested to you that I am making you a promise, you cannot deem me bound by my proposal."[486]

5.6.3.2. IS THERE ANY ACTION FOR THE PROMISOR?

One may argue that the promisor can have no right, for rights allow their holders to claim positive conducts from others and the promisor can claim no giving or doing of anyone. If, by claiming something from someone we mean the possibility that the promisor demands that the promisee does what she wants, we are right in making the point. Indeed, such a claim would be wrong and misrepresent reality. The promisee never commits to do what the promisor wants nor does the promisor ever expect that this should occur. What the promisor wants and the promisee does is produce a chance, an act that involves no commitment, no duty to perform an act for another in the future.

Not every claim however, is about a doing or giving. Claims could be about a not doing too. The owner of a thing is not someone who has claims on the basis of which X or Y must give F thing to her. She cannot use her right to claim something because she is in peaceful possession of its object. Something similar occurs with the promisor. She has already perceived the object of her right and is in actual enjoyment of the fruits of the chance. There is nothing for her to claim. Yet this does not mean that she could never be in a situation where she could claim something from someone. Her right could produce active claims for her too. This claim arises when the object of her right is infringed. How could that be?

(A) AS AGAINST THIRD PARTIES

Assume that I run a shoe factory and, in my aim to expand my business, I write a letter to a well-known international investor, saying something like "If you invest in my factory you can be sure that you will have X share and Y and Z." The investor happens to meet my promise with enthusiasm and decides to travel to my country to meet me in person. He visits the industrial complex where my factory is located, and after having found exactly what I presented with my promise, the shoe factory adjacent to mine catches his eye. The international investor visits my neighbor's factory, likes his establishment better than mine and offers Jose, its owner, to invest in his industry. He puts his money in my

[486] "The existence and the possibility to objectively perceive (we could say: the evidence of) such advantage of the promisor helps to resolve two problems… that of the relevance of promise in the juridical realm (and not just in the realm of the "courtesy" relations) and that of the sufficiency of the simple promise (which has not be refuted) to generate binding effects." Francesco Di Giovanni, *Le promesse unilaterali*, Cedam, Padova, 2010, p. 91.

neighbor's industry rather than in mine. He has a right to do that; he can dispose of his things through contracts freely, and he had no duty to invest in my project. My unilateral promise attracted him, did not obligate him to invest. I would however argue that I should have a claim against the third party beneficiary of the investment.

The investor had the possibility of visiting our industrial complex before I gave him the idea. He could, by himself, have thought about putting his money somewhere, realized that a shoe factory is the ideal place, thought of Argentina, and well, yes, find out that in the north of Argentina, close to Bolivia, lies a wonderful industrial complex which he could visit from Tokyo and invest in. There the investor used his bargaining mode of reasoning by himself. If he decided to invest in your factory rather than mine, I would say, Jose, let us celebrate. But this was not the case. When I declared to him the promise, I gave him an idea that he would otherwise never have considered: To put money in a shoe factory that is far away from home. I had to do some work to induce him to have such a thought. First I had to study the market of the universe of people with money, who could be interested in putting money in an industry like mine. I then had to elaborate the terms of the proposal. This guy lives on another continent, speaks a different language, thinks in different terms... I needed advice to address him in a way that could attract him and give him confidence so as to put himself on a plane and travel many miles. I had to calculate if the possibilities created by my proposal compensated for the cost of binding myself during its validity. All this demanded my time and the money I spent in professional consultancy, paperwork, carrier and telephone calls. Finally, and most importantly, I had to bind myself to the terms of the promise, never consider inviting other investors or do anything that could signify breach of promise. In short, the acquisition of the chance—that happily or not came to be materialized—cost me money. It was I who induced the investor to produce the chance. I was the person whose promise brought about what previously there was not, and hence the materialization of the chance, if at all, must be mine. All the work done to induce the promisee to cause the chance is there, benefitting you. You seized, as it were, the fruit that I had the right to enjoy. You took my chance, impoverishing me thereby. If rights *in rem* imply duties of non-intervention, and I owned the benefit of the chance, other people must recognize and respect my right. Certainly, people will continue taking advantage of the chances of others, but if my argument is sound, and private laws would make it law, then a party who profits from the chance of another would be obligated to compensate the owner for the expenses incurred in acquiring it; the cost of ideating and making a unilateral promise.

(A) AS AGAINST THE PROMISEE?

An action against the promisee would be thinkable in cases where the promisee infringes on the benefit of the promisor. For example, he communicates to the promisor that he has no interest in the promise, that there is no chance that she will look for the lost dog, make the contract or consume the thing she wants to gift him. Here the promisee extinguishes the chance and the benefit of the promisor, for the chance is the source from whence the benefit to the promisor flows. Is the promisee violating the right of the promisor?

5.6.4. THE LIBERATION OF THE PROMISOR BY THE PROMISEE AND THE CONSEQUENT EXTINCTION OF THE CHANCE DOES NOT VIOLATE THE PROMISOR'S RIGHT OVER THE BENEFIT OF THE CHANCE

The liberation of the promisor by the promisee may look like a violation of the right of the promisor. The promisee liberates the promisor, provoking the extinction of the chance from which the promisor rightfully enjoys. But even if the causal relation is in fact tight, in law the act of the promisee cannot be thought of as a wrong. When the promisee liberates the promisor from her obligation he is damaging nothing of the promisor. He is exercising one of the faculties that come with his promissory right. If the chance perishes with the act of liberation it does it not as the effect of an illicit act of the promisee but as a collateral, legally irrelevant effect of another act. The promisee concluded a cycle of her bargaining mode of reasoning, deciding that she will definitely not choose the promissory right. So the promisor is not seizing the fruits from the promisor's hand but concluding a cycle of his bargaining mode of reasoning. He must be entitled to do that, because the bargaining mode of reasoning is entirely and exclusively his own. If the chance emanates from a cycle of the bargaining mode of reasoning then, bad luck for the owner of the chance if the owner of the bargaining mode of reasoning decides to turn off the source of the benefit.

Will the promisee be able to use his bargaining mode of reasoning again? The fact that the promisee extinguishes a cycle of the bargaining mode of reasoning does not signify that the promisee will no longer be able to evaluate choices for an efficient bargain. As was explained in 5.4.1.2, the bargaining mode of reasoning is an inconsumable thing.

5.7. THE UNILATERAL PROMISE AMONG THE CAUSES OF OBLIGATION

5.7.1. THE CLASSIFICATION OF OBLIGATIONS REVISED

In 4.1.3.4 I divided the obligations into two main branches, the illicits and the licits. I have said that the illicit causes of obligations occur where a party loses something that another party gains, and the loser either un-wants the loss or does not want it. Tort includes all

those cases where the person who loses may be thought of as someone who un-wants, in the sense of strongly dislikes the loss. Assault, trespass and slander are all good examples of tort.[487] Unjust enrichment is about cases where the loser does not want to lose. The most illustrative case is the mistaken payment, where I did not really want to give you the sum. In the case where you enriched yourself by using my thing without damaging it I lost, but not in the sense that I un-wanted it. The state of mind of the owner is not like that of one whose thing has been destroyed; it is slightly different. The borderline case is the *negotiorum gestio*, where at first glance it appears that I rather wanted to confer you the benefit. Thinking clearly however, we realize that no one goes around taking care of the affairs of others. If I conferred you a benefit willingly it was because I thought that you would restitute me the expenditures that you benefitted from. People generally do not want to help others gratuitously.[488]

The licit causes of the obligation are the rights commutations. We have said that in perfect, irreversible commutations the two parties want the commutation, or one wants it and the other does not un-want it. Contract represents all the cases where two parties want a

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[487] You may ask, in what sense is it that the slanderer or assaulter wins? Pollock will answer, wrongdoing is "something like the self-seeking indulgence of passion". Sir Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law*, 4th ed., Stevens and Sons, London, 1895, p. 9. In a similar sense the interesting opinion of Pufendorf:

> in case a Man be hurt or injur'd by another, in any respect, the Person who stands justly charg'd as Author of the Wrong, ought, as far as it lies in his Power, to make Reparation. For otherwise it would have been a vain Command not to harm another, if the Party who actually suffers such a Harm, must be content to put it up without farther Notice, and leave the Offender to enjoy in Peace the Fruit of his Injury, never obliging him to refund, or to restore.

Samuel Pufendorf, *Of the law of nature and nations*, Basil Kennett translation, printed for J. Walthoe, R. Wilkin, J. and J. Bonwicke, S. Birt, T. Ward, and T. Osborne, London, 1729, Book 3, Ch 1, num. 2, p. 214 (emphasis omitted). See more in 3.2.3. and 4.1.3.3.2.

[488] The writers of Justinian's Institutes explain my point thus:

> The reason of this is the general convenience; otherwise people might be summoned away by some sudden event of pressing importance, and without commissioning any one to look after and manage their affairs, the result of which would be that during their absence those affairs would be entirely neglected: and of course no one would be likely to attend to them if he were to have no action for the recovery of any outlay he might have incurred in so doing.

Justinian, Institutes, 3, 27, 1.

Intervening in the affairs of another may be a nice thing to do. But I characterize it as an illicit interaction because of the injustice that it produces. The *dominus negotii* ends up with a value that the *gestor* lost without wanting to confer. I am here inspired by Planiol, who said:

> On peut donc tenir pour certain que dans le quasi-contrat la cause réelle de l'obligation n'est ni un fait volontaire, ni un fait licite; c'est un fait involontaire et illicite. Ceci revient á dire que l'expression quasi-contrat est tout à fait fausse; il n'y en a peut-étre pas, dans le droit tout entire, une seconde qui puisse rivaliser avec elle en impropriété.

Marcel Planiol, "Clasification des sources des obligations," in *Revue critique de legislation et de jurisprudence*, n. XXIII, (1904), pp. 224-237, p. 229.

commutation. The agreements that fail to fit with the offer and acceptance model, like the so-called relational contracts could, if craftily determined, be included in this box. The unilateral promises are cases where one party wants a commutation and the other does not un-want it. Let me dedicate four paragraphs to this.

The promisee of a unilateral promise did not explicitly want the transaction. He did not ask the promisor to make him a promise. Had he in fact asked for the promise, his request would, *rigoroso analisi*, not count. If this were the case the request of a promise would amount to an advanced mere acceptance, and mere acceptances are immaterial to the formation of promises (see 5.3.3). But let me go back to the case where someone meets another for the first time through a promise. Could we say that the promisee un-wants the promise? By un-want I mean what a reasonable person may feel with respect to a battery, slander or any such tort. I want to suggest that a promisor does not un-want the promise.

He would un-want the unilateral promise if, for example, the unilateral promise were empirically impoverishing him. Imagine that the making of a promise results in a situation where the promisee loses one of his properties. This would be the object of an un-want, similar to a trespass with damage.[489] But this is not the case. If the promisee is impoverished, he is only normatively and merely impoverished. He is only normatively impoverished in the sense that what he loses is his ability to neglect that the promisor got the benefit of a chance from him. He, as any other person in his private law society, has to recognize that the promisor has acquired a right to the fruit of the chance that he produced. Yet such impoverishment is automatically counterbalanced with a right to a performance or thing, in exchange for which he did not un-want to give the right over the chance to the promisor. The promisee's normative impoverishment is mere, as it were, in that the promisee has the choice to put himself in the situation he was before the chance was granted (see5.6.3).

Not un-wanting the promise is the reasonable promisee's state of mind and logically it couldn't be another. For could he be said to be one who does not want the promise? If he were one who does not want unilateral promises, his doors would be a priori closed to such interventions.

True, unilateral promises are partly pacific acts. On the one hand they give you a right but on the other hand they take from you a chance. They place you in a choice scenario that you may not have wanted had you appraised it. This is the risk of freedom. We will see in

[489] If the unilateral substitution implied that I materially lose nothing, as when someone gets a chance from me by granting me a performance of hers, I need not give my consent.

6.2 that the other possible options, if desirable, have nothing to do with private law. Regulating the unilateral promise as a cause of voluntary obligations is the best possible choice. Here I have tried to place them within a classification.

So I imagine the classification of the causes of the obligation as a gradation. At one extreme there is the tort and in the other the contract. Tort is about conflict and contract about peace.[490] Nearer the tort and before the center there is unjust enrichment, which is not really conflictive and yet is partly so. Near the center but towards the contracts rests the category I call unilateral promise. The unilateral promise is not totally pacific because there is no agreement; there is a unilateral attribution. But since attribution is of a right and not a duty it cannot be conflictive. One could very well want to be closed to receive benefits, but this is something that private law cannot presume (see my proposal in 6.2.3.2). So, if the principle of contracts is *pacta sunt servanda*, the principle of tort is *neminem laede*re and the principle of unjust enrichments is *nemo cum detriment alterius locupletari potest*, the principle of unilateral promises is "It may be assumed that everybody wants that which appears to be of advantage to him."[491]

5.7.2. COMPARING THE UNILATERAL PROMISE WITH THE CONTRACT

There are two main differences between contract and unilateral promise. The interaction from which the contractual relationship emerges is bilateral at its best: both offeror and acceptor contribute with their assent to the formation of the contract. The interaction from which the promissory relationship emerges is unilateral: the promisor makes the promise, inducing the promisee to cause the benefit of a chance for her. From this difference various practical implications emerge, the most important of which is probably that whereas contractual relationships need rules for the interval between the reception of the offer and the reception of the acceptance (the law of acceptance and revocation), the promissory relations do not need those rules, as there is no interval between proposal and formation of the legal relation.

On the other hand, the cause of the promissory obligation is different to the cause of the contractual obligation. The reciprocation of a contractual obligation is an intentional transfer of right, through which may pass another obligation or a right *in rem*. The reciprocation of a promissory obligation is an unintentional transfer, the spontaneous licit

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[490] The Latin word pactum comes from "pacisci," to make peace. We find it in the Edict of the praetor ('pacta conventa [...] servabo'). Interestingly enough, the German word for contract was coined to keep the semantics of pactum. "Vertrag," Zimmermann tells us, comes from "sich vertragen," to get along, be trustworthy, reconcile. Reinhard Zimmermann, "Derecho Romano y Cultura Europea," (translated by Salgado Ramírez), in *Revista de Derecho Privado*, No 18, (2010), pp. 5-34, at p. 12.

[491] Taken from Theo Mayer-Maly, "Divisio Obligationum," in *The Irish Jurist*, Dublin, (1966\1967), pp. 375-385, p. 384.

act of the creation of a right to enjoy the chance. I have not yet studied the implications of this difference. Perhaps the rules on the (non-voluntary) legal servitudes provide useful material for the perception and regulaton of such implications.

5.7.3. The utility of the unilateral promise

5.7.3.1. It helps state private law purge many of its corruptive arrangements

The national private laws have been trying to satisfy the necessity for a solution to cases of interested promise with very odd arrangements. Part 2 showed how the form of the collateral contract, the reliance theory and the doctrine of the *obligationes ex lege* have corrupted juridical interpretations of the English contract law, the French law of obligations and the German private law. As I will elaborate in the Conclusion and Final Remarks, the unilateral promise acts as a purge of corruptive arrangements. This is to say, if the state private laws incorporate the concept of unilateral promise, they will have the means to deal with interested promises without having to use the double contract analysis, the reliance theory and the *obligationes ex lege*. As the problem-causing arrangements will lose their practical sense, they will become automatically abrogated. Hence the relevant promises will be attended to as they ought, and the classical private law concepts and divisions will recover their healthy shape.

5.7.3.2. The unilateral promise works with all possible relevant promises

The unilateral promise was constructed not only to govern the cases that private laws enforce to their own determinant, but also the atypical cases. This is due to the fact that the unilateral promise is built within a set of relatively general sub-concepts—promise, reception, chance-causation and chance-perception. Having learned these concepts, a legal operator can capture, explain and regulate all legally interesting promises—not only the typical (promise of a reward, the promise of a contract and the fake gratuitous promise), but also the atypical interested promises (only in potency, see 1.2). This is the unilateral promise's response to the problem of the *obligatio ex lege* solution. (See 2.4.3.)

5.7.3.3. It does not recognize gratuitous promises

The traditional concept of unilateral promise (see Part 3) bears undesirable implications. Its integration in a private law makes private law have to enforce gratuitous promises. Private laws now have the means to enforce juridically interesting promises without having to enforce gratuitous promises. Honest gratuitous promises fail to exhibit the unilateral promise's third and fourth requirements, that the promisee produces a chance of pecuniary value and that the promisee perceives its value.

6. WHAT ARE THE GROUNDS OF THE UNILATERAL PROMISE?

Part 5 construed the unilateral promise as an interaction whereby two parties exchange "rights." A promisor gives a right to a performance to the promisee, and the promisee produces the chance from which the promisor benefits. The promisor perceives the value of this chance, I maintained, as one who acquires a right to the benefits of a thing belonging to another. In other words, Part 5 created a way of understanding interested promises as an exchange of rights. You see two reciprocal transfers, an exchange of a "promissory right" for the "right to the benefit of the chance." However, Part 5 did not evaluate the legal concept. The question we must answer to test this formal structure is whether these two "transfers of rights" qualify as just transfers of rights.

This part will test each transfer separately. Section 1 enquires into the basis of promises in private law. Why is it that the promisor can grant a right to the promisee without the promisee's request or acceptance? This question is relevant because acquisitions of personal rights in private law are generally taken to be voluntary acts. Section 2 addresses the legality of unilateral promises. If we grant that one could transfer a right to a non-accepting promisee, should we also accept that one could benefit from these unilateral interventions? Does something change when your promise not only grants a right to me, but also induces me to do something you want? Let us get straight to the first question.

6.1. THE BASIS OF PROMISE IS FREEDOM TO CONTRACT (OBLIGATIONS)

6.1.1. ANSWERING AN OLD QUESTION

There has been at least 500 years of debate on the subject of whether promises can transfer rights. The question is whether someone who neither requests nor accepts the promise can be deemed to have acquired the promissory right. The pragmatic jurist may miss the nerve of such a question: How could someone dislike the opportunity for benefit? However the question has a raison d'être. Rights are like extensions of our personalities. When someone finds our things, they find our very selves. So, a long line of jurists—which begins with Hugo Grotius, and includes authorities like Robert Joseph Pothier—would argue that a credit right must be willed to be acquired, either by request or acceptance. Otherwise the promisee finds his personality altered by the unilateral choice of the promisor, which undermines his freedom.[492]

[492] Hugo Grotius, *The Rights of War and Peace*, edited and with an introduction by Richard Tuck, Liberty Found, Indianapolis, 2005, Book II, Chapter XI, n. XVI is often quoted in this context:

I will argue that the promisor can confer a right to a non-accepting promisee because she has the "freedom to contract obligations." Since in my view the basis of promise is "freedom to contract," I will have to develop an understanding and justification of "freedom to contract." 6.1.2. denounces the errors of the usual scholarship on freedom of contract. I will point out these mistakes so that we can clearly see what a private law conception of freedom of contract must *not* look like. 6.1.3. sets adequate meanings for both "freedom" and "contract." 6.1.4 conceptualizes freedom of contract as a private law relationship. I determine freedom of contract as a privilege-no right relationship. By means of this relation, every person has the ability to peacefully interfere in another person's sphere of rights—i.e. by granting him a power or a right—and the other person

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> But that a Promise may transfer a Right, the Acceptance of the Person to whom it is made is no less required here, than in the Case of transferring a Property[…]

Samuel von Pufendorf, *The Whole Duty of Man According to the Law of Nature*, Andrew Tooke translation, Liberty Fund, Indianapolis, 2003 Chapter IX, number XVI, puts the argument like so:

> Moreover not only in Contracts, but in Promises the Consent ought to be reciprocal; that is, both the Promiser and he to whom the Promise is made must agree in the Thing. For if the latter shall not consent, or refuse to accept of what is offered, the thing promised remains still in the Power of the Promiser. For he that makes an offer of any thing, cannot be supposed to intend to force it upon one that is unwilling to receive it, nor yet to quit his own Title to it; therefore when the other denies Acceptance, he who proffered it loses nothing of his Claim thereto….

In his treatise on the law of obligations, Pothier deals with the question "Wherein a Contract differs from a Pollicitation". He first quotes the ordinances that have prohibited pollicitations in France and then distinguishes pollicitation from contract. Contract involves "the concurrence of intention in the two parties" and "pollicitation is a promise not yet accepted by the person to whom it is made." Then comes the famous paragraph 4:

> A pollicitation, according to the rules of mere natural law, does not produce what can be properly called an Obligation; and the person who has made the promise may retract it at any time before it is accepted; for there cannot be any obligation without a right being acquired by the person in whose favour it is contracted against the person bound. Now as I cannot, by the mere act of my own mind, transfer to another a right in my goods, without a concurrent intention on his part to accept them, neither can I by my promise confer a right against my person, until the person to whom the promise is made has, by his acceptance of it, concurred in the intention of acquiring such right.

Pothier quotes Grotius, and finishes his dissertation on pollicitation by saying that "the civil law, which comes in aid of the natural law," rendered pollicitations obligatory in Roman law. Robert Joseph Pothier, *A Treatise on the Law of Obligations, or Contracts*, David Evans translation, Strahan, London, 1806, n. 4, pp. 4-5.

Pothier's views are reflected in the statements of recent Italian authors. Franco Carresi, "Il contratto," in Cicu, Antonio and Francesco Messineo, (eds.), *Trattato di Diritto Civile e Commerci*ale, Giuffrè, Milano, vol. XXI, t. 2., 1987, p. 104, for example, states that positive law could make a promise without acceptance obligatory but that these norms constitute very specific exceptions to general principles of the law:

> To establish that someone could put into being a unilateral act which is alien to the types disciplined by the statutory law is hence unconceivable, for such act would boil down to an arbitrary intromission into the juridical sphere of another.

Then it makes sense that legal historian Wieacker talks about Grotius' idea as a "principle" and bases thereon "the Grotian theory of the contract conclusion which continues influencing the theory of law till the present day." Franz Wiacker, *Historia del derecho privado de la edad moderna*, Francisco Fernández Jardón translation, Aguilar, Madrid, 1957, p. 254.

has the no-right to oppose against such peaceful interventions. At the end of the section I reproduce the question that brought us to the present lucubration, but rather than asking why it is that the promisor can unilaterally confer a right to the promisee, I ask why is it that persons have freedom to contract obligations?

6.1.2. The public law conception of freedom of contract

Willingly or not, the vast bulk of the literature presents freedom of contract as a relationship between the state and its citizens.[493] The sovereign state attributes to each individual citizen a power to make contracts. This power enables citizens to make as many contracts as they want. The only limit they have is a negative one—their contracts cannot infringe the public order. Otherwise they are free to choose with whom to make contracts, what to include in their contracts and what corpus—or as one would call it "form"—will they give to the contract. A valid contract is one made in accordance with the attributed creative power. The valid contract binds the parties like a general state law.

It would be easy to solve our problem using the standard conception of freedom of contract. True, the norm by which offers must be accepted is an impediment to the valid formation of promises. Still, since states are progressively enforcing promises, the argument would go, states seem to be repealing the acceptance norm from the public order. States are recognizing the right of persons to promise things to others without previous request or posterior acceptance.

However, in adopting this solution we would perpetrate a fallacy. The parties of the right to contract are not two equally free individuals but an individual and an unequal, almighty entity capable of deciding what individuals can and cannot do. The state is over the citizen in that the state is what caused the right to make contracts, ideating it, delimiting its scope at will, and then attributing it to its citizens. We would be presenting freedom to contract as a private law right but elaborating it in the form of a public law right.

But what's wrong with that? The first corollary of the public law conception of freedom of contract is that contract must be seen not as a relation between two persons but as a relation between each contractual party and the state. If a citizen entered into a contractual relationship it is because the state provides a norm by which all citizens can enter into contracts. This norm looks like a conditional, where the conditional (or, as it is called, "situational fact") says: "whenever A agrees with A2 that A will do X for A2 and A2

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[493] For a master example of the public-law version of freedom to contract see Luigi Ferri, *L'autonomia privata*, Giuffrè, Milano, 1959.

will do Z for A," and the consequence (or "legal effect") says: "A must do X and A2 must do Z." In actualising the situational fact of the state norm, the two citizens are triggering the provided-for legal effect—that each will do what each said to the other. Although they are interacting in reality, the obligation does not come from the reality of the interaction. It comes from the reality of the performance of the conditional fact of the state law. The obligation does not link one person to the other but each to the state. One has a duty to do X because the state says so and the other has a right to X because the state says so. So when we talk about the obligation between persons we do so, as López de Zavalía puts it, in an elliptic language, for what is meant is a double relation connected by the state.[494]

But why so much effort spent insulating private law from the State? Mine is not an argument from liberty. I am not maintaining that the State is an evil consumer of freedoms and therefore it should be tamed to participate in private life merely as an enforcer of classical private law rights. I will repeat a reason I explicated in the introduction, and suggest a second one. Firstly, private law cannot explain its central notions with the facile recourse to the will of the state. If it does so then private law loses its autonomy, and it makes no sense to theorize about private law. Secondly, we want to hold that law stands without central authority and I believe that private law offers the platform for the elaboration of such stateless law.

6.1.3. On what a private law conception of freedom of contract must look like

Freedom of contract is composed of two terms, freedom and contract. A worthwhile conception of freedom of contract must first of all clarify what it means by these two terms.

6.1.3.1. What must "freedom" mean in "freedom to contract?"

We can think of at least two conceptions of freedom.[495] We have, on the one hand, what we can call "physiological" or "factual freedom." Factual freedom consists of an entity's ability to put purposes to itself, to think of the best ways to perform a self-conceived

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[494] To Domenico Barbero, for example, there is no relation between debtor and creditor but two functionally connected relations, one between creditor and legal order and another between debtor and legal order. Quoted in Fernando López de Zavalía, *Derechos Reales*, Zavalia, Buenos Aires, 1989, t. 1, §2, p. 19, note 12, who comments, "thus it is that when it is talked about legal relation between two subjects what it is meant, in an elliptic language, would be that double relation connected by the [same] legal order." *Idem*.

[495] If we assimilate freedom to rightness and contrast rightness with physical strength, as I do in the text, I suggest we can trace the distinction between the two freedoms back to Plato's Republic, where Socrates sets himself to combatting Thrasimachus's claim that "justice is nothing else than what is pleasing to the strongest." Conf. C. D. C. Reeve, "Introductory analysis of the work," in Plato, *Republic*, G. M. A. Grube translation and C. D. C. Reeve revision, Hackett, Indianapolis, 1992.

purpose and achieve it or translate that project into a fact. Factual freedom is normatively limitless. It is only limited by the amount of goals and means to achieve goals that a purposive being may be able to imagine and remember. As long as this entity imagines a new goal and finds the means to achieve it, he she or it expands her freedom.[496]

The other freedom is juridical, or the freedom of the private law. Juridical freedom is factual freedom determined by the idea of equality in an original transaction. It is as if two factually free beings faced each other in the context of an original transaction and, ignoring who is more powerful than the other but acknowledging that factual weakness could be inconvenient for the realization of their respective purposes, settled the standard of a median personality and endorsed it. This middle person, the private law persona, is able to do whatever she desires insofar as the realization of her desire does not infringe the (equivalent) freedom of the other. So, as the person comes with juridical freedom it also comes with a correlative no-freedom. Whenever she happens to have a purpose in mind, she must consider, in addition to the means with which she makes the purpose realizable, whether the realization of her purpose would interfere with the freedom of another. If it would, then she must forbear action. If it would not, then she is free to do it. This is a very abstract principle. We will see later how private law specifies it.

It is obvious that, if freedom to contract is to be conceptualized in the terms of a private law relationship, we must develop an understanding of freedom to contract that reflects juridical freedom.

6.1.3.2. WHAT MUST "CONTRACT" MEAN IN "FREEDOM TO CONTRACT?"

We now want to know what the "contract" of "freedom to contract" should mean. I want to suggest that, for our purposes, we must adopt an ample understanding of contract. We

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[496] A version of the purely arbitrary free will appears in the manifesto of the Renaissance, "The Oration on the Dignity of Man" (1486), by Pico della Mirandola:

> We have given you, O Adam, no visage proper to yourself, nor endowment properly your own, in order that whatever place, whatever form, whatever gifts you may, with premeditation, select, these same you may have and possess through your own judgement and decision. The nature of all other creatures is defined and restricted within laws which We have laid down; you, by contrast, impeded by no such restrictions, may, by your own free will, to whose custody We have assigned you, trace for yourself the lineaments of your own nature. I have placed you at the very center of the world, so that from that vantage point you may with greater ease glance round about you on all that the world contains. We have made you a creature neither of heaven nor of earth, neither mortal nor immortal, in order that you may, as the free and proud shaper of your own being, fashion yourself in the form you may prefer. It will be in your power to descend to the lower, brutish forms of life; you will be able, through your own decision, to rise again to the superior orders whose life is divine.

In http://bactra.org/Mirandola/ (27-1-2016)

must take "contract" in its verbal sense, in the active sense of undertaking liability in general.[497]

We need something like a freedom or capacity to contract liabilities in general because we want to explain contract as a relation between the parties—without a mediating state or other overarching moral order. Let me develop. If we look closely at the formation of a contractual obligation, we will find a stage where one of the parties transfers a power to accept the offer to another who acquires it without accepting it. This unilateral empowerment does not obligate the offeror in the sense that the contract does, for she can always revoke the offer. Yet this unilateral empowerment must render the offeror liable in some sense. If the offeror were not liable in any sense, then the acceptance of the offer would effect no legal change between the parties. In other words, the offeree can accept the offer and *legally* obligate the offeror because the offeror gave him a *legal* power to conclude a contract. If the liability-power emerging from an offer were of a moral nature for example, the relationship maturing from the acceptance would also be moral, not legal. So the question arises: If not the will of the state or morality, what says offerors are bound to their offers? What is it that justifies the relation that determines that acceptance concludes a contract? My response is freedom to contract.

Another reason for making the term "contract", in the context of "freedom to contract," mean the ability to contract liability in general is that there are various ways in which persons can obligate each other. 4.1.4.3 has shown various non-contractual voluntary transfers of rights, including the promise *solvendi causa* and the bequest. Moreover, Part 5 determined the concept of unilateral promise so as to give adequate treatment to the many promises that private laws enforce, to their own detriment. These are acts whereby one person transfers a credit right to another who neither requested the right nor accepted it. Promise is not the only peaceful non-contractual interaction obligating parties in private law. Lawyers talk about "contracts of adhesion," "relational contracts" and other

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[497] As a matter of fact, the substantive term *contractus* developed from the term *obligatio contracta*, which meant the action of having contracted an obligation. Conf. Fritz Schulz, *Classical Roman Law*, Oxford, Clarendon Press, 1951, n° 799, p. 465: "The verb contrahere is old and was used both literally and metaphorically (Thes. L.L. iv. 757 ff., 764). If used metaphorically contrahere means as a rule (Voc. Iur. Rom. i. 1001) 'to effect', 'to perpetrate', 'to bring on oneself (admittere, commitere, constituere): contrahere invidiam, offensionem, amicitiam, inimicitias, culpam, crimen, stuprum, incestum, aes alienum, societatem, nuptias, etc. Students must beware of believing that in common Latin usage contrahere meant primarily 'to make a contract'. Even the classical lawyers used contrahere in the wide sense we have indicated. Some of the relevant texts are spurious, but when Gaius (Inst. 2. 14) said: 'Incorporales res sunt quae tangi non possunt qualia sunt... obligationes quoquo modo contractae', he certainly had in mind the obligations ex delicto as well as obligations arising ex contractu." So *contrahere obligatio* referred to the action of contracting an obligation and one could contract an obligation either by delict or by contract.

voluntary sources of liability that are contracts only by analogy. All these acts deserve further study and description. Yet they all seem to be reducible to a commutation of rights. Firstly, because one or two intelligences plan or ideate a future relationship, and secondly because the ideated relationship is about one party giving something to the other because the other has given, is giving or will give something else in return. And so we arrive at my point. The conditions under which a commutation could occur are, and cannot but be, established by an initiative act of confidence/tolerance.[498] Any kind of transfer presupposes that a party undertakes a commitment or discloses information for the purpose of making of a transaction and this initial act of trust is made in ignorance of whether the addressee in fact wants (or is interested in) the transaction. The most familiar example is probably the contractual offer. We must ground the first attribution/reception as the basis on which all private law transactions unfold. I think of freedom of contract as the worthwhile candidate.

6.1.3.3. We must conceive freedom to contract as a private law relation

We must present freedom to contract liability in general as something like a relation of juridical freedom. It must be about the freedom of one to give something of her own to another, and this freedom must be correlated by something giving legal status to the fact that the receiver of the thing cannot but take it as his own, or acquire the unilaterally transferred entitlement.

I now proceed to determine freedom of contract in what I suggest is the proper technical form.

6.1.4. Freedom of contract as a privilege/no-right relation

Freedom of contract must appear as a privilege/no-right relation.[499] This relationship means a person has the ability to peacefully alter another's sphere of rights—i.e. by giving

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[498] Naturally, if contract is taken to mean the capacity to undertake liability, and every liability comes with a correlative "power," contracting liability implies, at the same time, imposing a power over another, or choosing that another contracts a power.

[499] See the discussion of privilege and no-right relations in Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," in *The Yale Law Journal*, Vol 23, No 1, (1913), pp. 16-59 at pp. 31-44, especially p. 36, where the author supports my determination. Now consider Pierre Schlag's explanation of the power-liability relation:

> [The power–liability relation] pertain[s] to "control" over the alteration of legal relations. If A has a power vis-à-vis B, then A upon satisfying certain specified conditions ("super-added facts") can bring about a specified change (X) in their relations. In such a case, B has a liability in that B's relations are susceptible to being changed by A.

Pierre Schlag, "How to Do Things with Hohfeld," in *Law and Contemporary Problems*, Vol 78, No 185, (March 6, 2015), p. 202. In the light of this explanation, we could determine the same freedom to contract

him powers and personal rights—and no claim can be made against such peaceful alteration—like, for example, opposing injunctions. [500]

To illustrate, a person has the privilege to grant a promissory right to another and the promisee cannot neglect the transfer, and for example, ask the promisor for compensation for the disturbances caused by her unrequested promise. (Notice that the choice that are the objects of the privilege at stake have the efficacy of altering another's sphere of

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in power-liability terms: persons have the power to alter the legal status of others by transferring them powers and rights and the others whose legal statuses have been altered have the liability to take the transferred powers and rights as things of their own. This might be why Kocourek claimed:

> Theoretically there is no difference between a power and a Privilege.

Albert Kocourek, *Jural Relations*, MacMillan, Indianapolis, 1927, p. 24.

[500] Private laws institutionalize this capacity in diverse declarations. Freedom to contract can for example be read in Art. 1124 of the French Civil Code, which says: "Any person may contract, if he has not been declared incapable before law."

Jurists give voice to freedom to contract when they talk about "capacity to contract", "freedom to make contracts" and "autonomy of the will."

Kant himself identifies this freedom in what he calls "innate freedom" or "the only original right belonging to every man by virtue of his humanity." Kant suggests that "the principle of innate freedom already involves" the authorization to do to others "such things as merely communicating his thoughts to them, telling or promising them something". Let me quote the entire paragraph:

> *There is only one innate right*
>
> *Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.—This principle of innate freedom already involves the following authorizations, which are not really distinct from it (as if they were members of the division of some higher concept of a right): innate *equality*, that is, independence from being bound by others to more than one can in turn bind them: hence a human being's quality of being *his own master* (*sui iuris*), as well as being a human being *beyond reproach* (*iusti*), since before he performs any act affecting rights he has done no wrong to anyone; and finally, his being authorized to do to others anything that does not in itself diminish what is theirs, so long as they do not want to accept it—such things as merely communicating his thoughts to them, telling or promising them something, whether what he says is true and sincere or untrue and insincere (*veriloquium aut falsiloquium*); for it is entirely up to them whether they want to believe him or not.
>
> The aim in introducing such a division within the system of natural right (insofar as it is concerned with innate right) is that when a dispute arises about an acquired right and the question comes up, on who does the burden of proof (*onus probandi*) fall, either about a controversial fact or, if this is settled, about a controversial right, someone who refuses to accept this obligation can appeal methodically to his innate right to freedom (which is now specified in its various relations), as if he were appealing to various bases for rights.

Immanuel Kant, The Metaphysics of Morals, Mary J. Gregor translation, Cambridge University Press, Cambridge, 1996, 6:237-6:238, pp. 393-394. So, in Kant, the ability to alter others' freedoms by communicating thoughts, promises and similar operative acts extends over the most foundational of all rights, that right to which we must recur whenever we have doubts about more concrete norms and doctrines. Kant is very conscious of the normative fact that the making of a promise to another alters the personality of the promisee without the promisee's acquiescence. He is conscious that, in promise, the promisor chooses that the promisee acquire an un-chosen right. Kant nevertheless believes that such interference does not hinder the promisee's freedom, even if the promisee does not assent. He defends this point by saying that the promisor does something "that does not in itself diminish what is" of the promisee (*Idem*, 6:238, p. 394), that the promisee, like "every human being would necessarily accept such a right (since he can always gain but never lose by it)" (*Idem*, 6:294, p. 441). We will come back to this in 6.4.2.

personal rights—I choose that, from now on, you have a credit right against me; a credit right which, as an extension of your personality, makes you responsible for its gains and possible contingencies).[501]

Having established the legal basis for promise, it is now time to reproduce the question that gave place to the present investigation: If, as I am arguing, the basis on which someone can choose that another acquires a promissory right is freedom to contract obligations, why then is it that persons have the freedom or privilege to grant rights to others by their (unilateral) choice? Or, from the point of view of the entitled party, why is it that, in a world where every entitlement must be chosen, a person happens to acquire a right without having chosen it? [502]

6.1.4.1. THE ARGUMENT FROM EQUALITY: WE ALL HAVE THE SAME PRIVILEGE

I begin with an argument from equality. My privilege of being able to put others in the condition of being my creditors is not a faculty that only I (Javier Habib) lay claim to. No. I can address others with acts that put them in the condition of owners of a performance of mine inasmuch as others can address me with such acts. Accordingly, freedom to

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[501] On the possible contingencies of personal rights—which are never inconvenient—see the case of the third party who uses the right of his debtor to satisfy his expectations in 6.1.4.2.1 *in fine*.

[502] The question addressed here is not "to what extent can one person obligate herself to another?" but "why is it that one person can obligate herself to another?" Answers to the former question are dictums on the object of contracts and promises, and have to do with matters like illicit and impossible agencies, usury, the things that are outside of commerce, the public order and a great deal of competition and consumer law. We have said something about these issues under the topic "right over our disposable freedom" (go to 4.1.3.2(a), 4.1.4.3(a) and 5.2.1.2). Answers to the question I am addressing now have to do with the presupposition of the previous question. It has to do with the possibility of contract, promise, testaments, and every other practice where one party commences or perfects a transaction by imposing a power or a right on another. (See 6.1.4.3.)

A moment of Hohfeld's discussion of privileges will help me further illustrate this differentiation. Hohfeld quotes a paragraph of Holland's Jurisprudence to later refine it with his analysis. He quotes:

> If ***the power of the State will protect him in so carrying out his wishes, and will compel such acts or forbearances on the part of other people as may be necessary in order that his wishes may be so carried out, then he has a 'legal right' so to carry out his wishes.

And then says:

> The first part of this passage suggests privileges, the middle part rights (or claims), and the last part privileges.

Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," in *The Yale Law Journal*, Vol 23, No 1, (1913), pp. 16-59, at p. 34. In my view, we could say that the subject of Holland as refined by Hohfeld has the privilege of carrying out his wish of making offers and promises to others, and the other subjects in turn have no right to complain against those pacific interventions. At the same time, the subject has the right to compel others to forbear from acting in a way that may distort her disposable freedom. Having her disposable freedom as a right of her own, our subject can carry out her wish of transferring part of it to another, for she has the privilege to do that through offers and promises.

contract obligations complies with the *rule of equal freedom*; it is something that you recognize in me inasmuch as I recognize it in you. This means that you could also decide that I am a creditor of yours.[503]

6.1.4.2. A REPLY TO THE ARGUMENT FROM FREEDOM OF CHOICE: I CANNOT CHOOSE NOT TO CHOOSE

One could object to my argument as over formalistic, saying that with similar reasoning one could legalize whatsoever social practice. So, if you are able to entitle me with an unrequested right because I can do the same thing to you, and only because of this equal possibility, then, insofar as I grant you the same possibility, I could also deem myself entitled to unilaterally impute duties to you. We would have, through the same process, validated freedom to command. There is something missing in the validating process. One must take notice (the argument proceeds) of the fact that private law is not only about equality of choices but also about the choices that people *actually* choose. In order for someone to acquire a right, duty or whatever legally significant value, the acquirer must will it, choose the right or duty, make it part of himself or relinquish it with a volitional act. Not only the disposer but also the acquirer must *actually* want the disposition-acquisition. Otherwise we contradict the principle of freedom of choice.[504]

In the light of these considerations, hence, freedom to contract cannot stand after its being evaluated from the principle of freedom of choice. For, according to the claimed freedom, A can choose for B legal stances that B has not actually chosen, which undermines B's freedom of choice.

Let us analyze this argument.

In the act of acquisition there is one person who gains and there is another person who loses. Freedom of choice demands two things for the acquisition to be rightful. *First condition*: the person who loses in the act of acquisition must assent to the acquisition—

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[503] "…[W]hatever one party asserts from this standpoint must be true of everyone else. And this is something that all who can so view themselves can also recognize in others. Therefore, the claims parties make in relation to each other must be absolutely the same. No one claims the right to place others under any obligation or constraint that others could not simply do vis-à-vis her." Peter Benson, "Misfeasance as an Organizing Normative Idea in Private Law," in University of Toronto Law Journal, 60, (2010), pp. 731-798, p. 781. Later utilizing the same principle to justify the ability (or "rightful power") to appropriate res nullius with the consequent unconsented restriction on the other parties' normative abilities. (Idem, at pp. 787-788.)

[504] I cannot but recall Plato's remark on that justice is so necessary among man that even among thieves some conception of justice applies. Plato, *Republic*, G.M.A. Grube translation and C.D.C. Reeve revision, Hackett, Indianapolis, 1992, Book 1, 351 c – 352 c.

the loser must assent that the acquirer, rather than she herself, owns the acquired choice. *Second condition*: the person who gains in the act of acquisition must assent to the acquisition—the winner must choose to acquire.

An acquisition would not comply with the first condition if the only person choosing the acquisition were the acquirer—the loser losing without choosing it. I would acquire a choice unilaterally, for example, in the act of occupation. When I acquire the choice to exclude others from doing things with a thing that had no owner, I reduce the choices of others. For example, they are no longer able to occupy the thing themselves. Occupation has a problem with the first condition (although not with the second), in that its perfection requires no consent from the persons who lose in the occupation. In contrast, the unilateral promise satisfies the first condition, for the only person who loses a choice in promise is the promisor, the person who voluntarily gives a choice to the acquirer.

The unilateral promise has a problem with the second requirement. The promisee does not have time to choose the transferred choice. As a matter of fact, the choice chooses him. The promisee, as we have seen in 5.2.3.2(b), 5.3.2 and 5.3.3, acquires the promissory right by gaining awareness of it, by the time he had the possibility to consider whether he wants to keep the promissory right he already had it. So acquisition by reception plainly contradicts the second condition—the acquirer acquires a new choice of action without choosing it.

Is this possible in private law? I *claim* that it must be!

The argument is this:

A private actor who wants to reserve the choice of whether she is to be considered entitled to a transferred entitlement is one who renounces the possibility of offer, promise and other private law interactions. Freedom to contract will arise as the legal relation that we must presuppose in order to render voluntary transactions possible in private law.

If I were to say, in conformity with the alleged principle that every choice must be chosen, that in order for you to have the choice to choose you must choose that choice too, then I will also have to ask you whether I can ask you to choose. This puts as in an infinite regress. For if I ask you 'Can I make you a promise?' I am asking you to choose. By asking you to choose, I am imposing on you the choice to choose. At some point, if we are to have the opportunity to meet each other in a voluntary transaction, one must be entitled to impose, as it were, on the other, the choice to choose. Otherwise we make the whole enterprise of acquiring choices impossible. I cannot choose not to choose if at all I want to

have the choice to choose. This is a requirement for voluntary transfers of any sort and in any time and space. I will come back to this in 6.1.4.3.

(A) And nothing changes if the value transferred is not a power but a right

You may reply that it is not the same to receive an offer as a promise. When I ask you "Can I make you a promise?" I am making you an offer, not a promise. Whereas offers transfer powers, promises (are intended to) transfer rights. We grant it that persons acquire "powers" to accept offers without choosing them but not that they acquire "rights" without choosing them.

Contra legem, the claim is made in various jurisdictions.[505] I want to argue that, ex principle, the claim, if it is well grounded, is sterile, at least as to my claim, which is that unilateral promises can transfer rights.

Let me begin with the grounded version of the claim:

Persons can transfer powers because powers are revocable at will. X can entitle Y with the choice to accept the offer because, until and unless X receives what X wants in exchange for what Y offers, X is not obligated in private law. Obligations or (what is the same) credit rights need reciprocation to be perfectly transferred. If this is the argument, then the claim is grounded. However it does not go against the claim that unilateral promises can transfer credit rights, for when the promisor gives the right to the promisee, the promisee immediately causes a right for the promisor (see 5.4.2).

Let us move to the ungrounded version of the claim.

One can transfer a power and not a right because a power is a different thing to a right.

[505] I say *contra legem* because almost every jurisdiction has positive law enforcing unaccepted promises when made in consideration of something—be this thing a past favor, an un-chargeable debt or the chance to have something. For modern private laws see Part 2 and 4.3.3.2 (d.1.). In Roman law, there is the *Pollicitatio*, see Digest 50,12 *De pollicitationibus*.

I will reply that, if there is such difference,[506] it is immaterial as to their transferability.[507]

Power and right are, properly speaking, subjective powers, i.e. the ability to do something that one (sometimes called the "active subject") has as against another ("passive subject").[508] The specific difference between power and right is that the subjective power that is called "power" is revocable and the subjective power that is called "right" is definitive or irrevocable. Whereas the ability that a creditor has (to claim contractual performance) as against a debtor is unqualified, the ability that the offeree has as against the offeror (to bind the contractual offeror to the offered contract) is qualified with the no-right of complaint in case of offer-revocation.[509] What the promisee acquires is—qua

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[506] For if the power to accept the offer is the seed from which the right to a performance could mature, then it is fair to ask, is the seed less than the fruit? By the contractual offer, it is *communis opinio*, the offeror transfers a power to the offeree. This power will mature in a contractual right when the offeree accepts the offer. The offeror must add nothing else and the correlative duty will bind her. It suffices that the offeree accepts the offer. Isn't this telling you that the power to accept the offer is in some sense, the same thing as the contractual right?

Kant's words in relation to the acquisition of the legate by the legatee are pertinent:

> When the will is opened he sees that he had already at that moment, before accepting the legacy, become richer than he was before, since he had acquired the exclusive authorization to accept and this is already an enriching circumstance.

Immanuel Kant, *The Metaphysics of Morals*, *ob. cit.*, at 6:366, p. 500 (italics omitted).

[507] With good reason Pugliati states that, "As it is easy to see, that which will be said about the acquisition of a right can worth for every subjective situation, this expression being intended as comprehensive of all specific entity that makes a determined subject a boss [capo] (juridical power, *status*, faculty, etc.)." Salvatore Pugliatti, "Acquisto del diritto (teoria generale)," in *Enciclopedia del Diritto*, t. I, Giuffrè, 1958, Varese, p. 509.

[508] López de Zavalía teaches that; "The subjective right is a favorable juridical position. With that claim, within the genus "juridical position of a subject" it is marked the basic difference with the juridical duty, which is an unfavorable position." And this favorable position accepts different "positions of freedom", one is the right with a claim, other is the power, there are several. *Derechos Reales*, Zavalia, Buenos Aires, 1989, t. 1, §3, n.2, p. 46 and ss.

[509] Could somebody say that an offeror who sells the offered thing to a third party without revoking the first offer is acting licitly?

It is difficult to find cases showing the practical significance of the power to accept an offer. For if an offeree notices that the offeror is disposing of what she offered him without revoking the offer, he will simply accept the offer and demand breach of a contract. He will not go to a court and say, "Look, the offeror is breaching his liability to be put in a contract." Notwithstanding, I found a case where the miss-revocation of the offer is so peculiar that the legal significance of offers is made emerge. In *Petterson v. Pattberg* ((1928) 22 Ill. 248 N.Y. 86, 161 N.E. 428) the defendant wrote a letter to the plaintiff saying that he will reduce the debt in an amount of $780 if the plaintiff could pay him the 5 years installments all at once before March 31. When the plaintiff knocked the defendant's door and said that he has come to cancel the debt, the defendant said the plaintiff that he had sold the bond to a third party. The plaintiff claimed for the recovery of the $780, which was the money he had to lose by canceling the bond held now by the third party. The lower court found for the plaintiff with interests and the New York Appellate Court confirmed.

power—as much a power as what the offeree in fact acquires. And on the other hand, promise is as much unilateral as is the contractual offer. Accordingly, like promises contractual offers effectuate unilateral transfers of powers.[510]

My question is this, is it really the fact of their revocability that makes powers transferable?

In my opinion what makes all powers transferable is that they are favorable positions. They stand in opposition to burdensome or unfavorable positions, which it should be noted, could come in rights too. This typically occurs where one acquires real rights, like the charge of maintaining an immovable object in conditions that do not create unreasonable risks to the adjacent property or the notorious "*obligations propter rem*."[511] But unilateral promise, offer, bequest and every undertaking that transfers *in personam* rights and *in personam* powers (howsoever they are acquired), only adds to the acquirer's

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The decision shows the practical significance of the power transferred by offers: Offerors can always revoke their offer; yet, they must mind that while the offer stands, its legal significance is such that acceptance could knock on their door, making them liable for what they offered.

Still, the case could be articulated to make a stronger point. This point is that Pattberg contravened some sort of liability before he revoked the offer. Think of the case this way: Had Pattberg not transferred the bond to a third party he could have effectively revoked the offer. The offer of Pattberg to Petterson was one the acceptance of which consists in an act—the fact of transferring money hand to hand. It is immaterial that Petterson says to Pattberg, "Hey I want to pay you." What Pattberg wanted was the act of receiving the 5 years installments. (Of course, one could argue that the acceptance of this offer involved some type of collaboration on the part of the offeror—receive the payment—and that it would be unreasonable to consider that an offeror could deny such collaboration after having made such offer. But let us say that) Pattberg revoked the offer at the time. If this is the case, then what made him liable? What made him liable was that he revoked the offer after having breached it. He should have revoked before selling the bond to the third party. In having transferred the bond to a third party, he contravened her liability to cancel the bond in exchange for the total payment of the debt offered to Petterson.

[510] Hohfeld makes an argument comparable to Langdell's on the issue of revocable offers. See Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," The Yale Law Journal, Vol 23, No 1, (1913), pp. 16-59, at p. 49-54, especially 51. See the interesting commentary of Pierre Schlag, "How To Do Things with Hohfeld?...," *op. cit.*, p. 197.

[511] *Propter rem* obligations are the obligations that come with the thing that one happens to own. Tettenborn offers an example: "If A, a landowner, agrees with B, a neighbour, not to use his land in a certain way (such as not to build on it) and then sells the land to C, C is in certain cases [namely when C had notice of the agreement or the agreement was registered] bound by the agreement." A. M. Tettenborn, An Introduction to the Law of Obligations, Butterworths, London, 1984, at 139 and note 2. There are *propter rem* obligations in all legal systems and they are particularly prominent in Scots law, under the name of the "affirmative real burden." George Gretton, "Ownership and its Objects," in *RabelsZ Bd.*, 71, (2007), pp. 802-851, at p. 812, note 46.

capacity for choice.[512] As Kant talked of the right to acquire a bequest, they are things that do not in themselves diminish what belongs to the acquirer.[513]

The most invasive situation that could emerge from the possession of a credit right is where a creditor of the creditor decides to exercise the first creditor's credit right through him. Some private laws grant this action when its exercise would provide the claimant with the means to satisfy his credit. We call it subrogatory because the creditor subrogates another creditor by choosing to exercise his right. (We also call it Paulian because it was the jurist Paulus who first determined the justice of this action). Even here, if the promisee's creditor exercises the promissory right by the promisee, isn´t the promisee *freer* than he was before?

And if the position of the promisee were not objectively but subjectively unfavorable, as where he received the right reluctantly, he can not only always *reject* the right,[514] but also *ignore* it. For, once again, they do not put burdens on creditors and they automatically perish with the passage of time (See 5.6.2.2.(c)). This is probably why much legislation has established the principle that "it may be assumed that everybody wants that which appears to be of advantage to him."[515]

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[512] Planiol rightly points out that in the contractual obligation it is the will of the debtor that assumes the preponderant role:

> Quand l'obligation naît d'un contrat, c'est la volonté de celui qui s'oblige qui joue le role preponderant; l'obligation n'existe que dans la mesure aú il l'a consentie et acceptee. Par suite, sa capacité est une condition nécessaire du contrat, car celui-ci, étant l'oeuvre des parties, ne peut étre valable et efficace que dans la mesure où la loi leur reconnaît la *capacité* de s'obliger.

Marcel Planiol, "Clasification des sources des obligations," in *Revue critique de legislation et de jurisprudence*, n. XXIII, Paris, (1904), pp. 224-237, at pp. 227-228.

[513] Immanuel Kant, *The Metaphysics of Morals…*, op. cit., 6:238, p. 394.

[514] The commentary to the unilateral promise provision of the Principles of European Contract Law says:

> Even though a promise does not require acceptance it may be rejected by the promisee. A rejection will destroy the promise

Ole Lando and Beale, Hugh (ed), *Principles of European Contract Law*, Parts I and II, The Hague, Kluwer Law International, 2000, at 157. James Viscount Stair was probably the first author to make this argument:

> It is true, if he in whose favour they are made, accept not, they become void, not by the negative non—acceptance, but by the contrary rejection. For as the will of the promisor constitutes a right in the other, so the other's will, by renouncing and rejecting that right, voids it, and makes it return.

The Institutions of the Law of Scotland, (D.M. Walker Ed.), Edinburgh University Press, Edinburgh, 1981, at 1.10.4.

[515] This principle appears in the Codex Maximilianus Bavaricus civilis (Part 3, Chapter 13, n. 1) and the Civil Code of Western Galicia (Part 3, nn. 380 and ss.). Quoted in Mayer-maly Mayer-Maly, "Divisio Obligationum," in *The Irish Jurist*, Dublin, (1966\1967), p. 384. We see a similar principle in Justinian Institutes I, 21 pr:

6.1.4.3. A SYSTEMATIC NECESSITY: VOLUNTARY TRANSACTIONS NEED FREEDOM TO CONTRACT

I have tried to argue that persons have the freedom to grant powers and rights to others. Here I will further support my claim by saying that voluntary transactions need freedom to contract. What do I mean? Let me develop.

The standard idea of private law persons is that of individuals with rights over things and a freedom to act without damaging the things of others. You can do whatever you want with your body, in your land and with the things that other persons owe you, and you are free to do as much as you want insofar as you "do not harm the bodily integrity of others," "do not use other's things" and "conserve and perform the credit that others have against you." Looking at this picture we can say that private law is about the lives of isolated wills. They act within the boundaries of their right and, when they act outside of their dominium, they do so without interfering with the life of others.

However, the metaphor of the isolated wills is only partially true. Ask a person as simple a question as; "How did you acquire your house?" You will find out that regardless of the means that provided her with ownership over her house, these means were founded on an interaction, and the interaction began with one person interfering in the life of the other without asking for permission. If the thing came to her by contract, someone had to tolerate the offer, or the invitation to make an offer, or the invitation of the invitation to make the offer… and if the thing came to her by occupation, others, many others had to tolerate that the thing will be no longer be appropriable by them. Enquiring further, you will find that she probably promises things, makes testaments, in general acts upon others in ways that, regardless of their opinion, they tolerate.

One can justify almost every practice with the argument of equality of burdens and dismiss almost every practice with the argument of lack of consent. One could say, using the equality argument, that one is free to impose duties on another because the other is also free to do such a thing; and one could say, using the consent argument, that one cannot offer things to others because contractual offers imply unilateral interventions in the spheres of entitlements of others. The scholar could very well abstract the ideas of equality and freedom of choice from the law where they appear and enter into the business of explicating their possible implications systematically. This is a noteworthy,

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> La auctoritas del tutor es necesaria en ciertos actos a los pupilos, y en otros no: por ejemplo, no es necesaria cuando estipulan que se les ha de dar alguna cosa, y es necesaria si los pupilos prometen a otros. Se ha establecido que pueden sin la auctoritas del tutor mejorar su condicion, aunque necesitan de aquella para hacerla peor. De donde se deduce que en aquellos casos de los cuales proceden obligaciones mutuas, como en compras, ventas, locaciones, madnatos y depositos, si no interviene la acutoritas del tutor, los que contratan con los pupilos quedan obligados, pero no los pupilos.

indeed intrinsically philosophical practice, but it is not the work of the jurist. The pure form of private law appears to the jurist as determined in a complex of rules, concepts, principles, patterns of interpretation and institutions. However defeasible, these private law pieces form a robust order, an order where questions like "can persons impose duties on others unilaterally?" have clear-cut answers. In this order I faced the question "could persons grant rights to others unilaterally?" Agreed, it is a difficult question. Very authoritative jurists offer answers alternative to mine. Though I find them unconvincing, they have arguments to justify their position as well. I think the question ultimately is, whether the private law's main doctrines and concepts would suffer a considerable change once we introduce the institutions I propose. I think I have already diluted this concern. I am of the opinion that if one denies the efficacy of promise on the grounds that it cannot be accepted, we must also deny the efficacy of the contractual offer (and the contractual offer is not the only case where a person appears to tolerate unilateral attributions).

Certainly all the voluntary transactions presuppose a moment where one party speaks to another and the other listens—i.e. receives an entitlement. We need therefore to presuppose the privilege by which persons can impose powers and rights on others, and the no-right by which persons have nothing to say against these pacific interventions. Freedom to contract is, I believe, the only means with which we can explain private law relations as strictly bipolar interactions.

6.2. We are bombarded with promises: An everyday fact and the best private law solution

6.2.1. Interested promise, an everyday fact

Granting that persons can transfer rights to others unilaterally, we move now to evaluate a very sensitive issue. This issue arises in the context of an everyday fact. The opinion by King, J., with Low, P. J., and Haning, J., in the American case *Harris v. Time, Inc* [516] vividly depicts the fact at stake:

[516] Joshua Gnaizda received a letter from Time. The front of the envelope contained a window, which revealed a picture of a calculator watch and the following statement: "JOSHUA A. GNAIZDA, I'LL GIVE YOU THIS VERSATILE NEW CALCULATOR WATCH FREE Just for Opening this Envelope Before Feb. 15, 1985." After—and only after—opening the envelope, the following additional clause was revealed: "AND MAILING THIS CERTIFICATE [for a subscription to Fortune Magazine] TODAY!" Joshua, having opened the envelope, demanded the calculator watch without mailing the subscription certificate, based on the promise made in the envelope window. Time refused. Joshua then brought a class action against Time

> For many, an unpleasant aspect of contemporary American life is returning to the sanctity of one's home each day and emptying the mailbox, only to be inundated with advertisements and solicitations. Some days, among all of the junk mail, one is fortunate to be able to locate a bill, let alone a letter from a friend or loved one. Insult is added to injury when one realizes that individual citizens must pay first class postage rates to send their mail, while junk mail, for reasons apparent only to Congress and the United States Postal Service, is sent at less one-half of that rate. The irritation level soars to new heights when, succumbing to the cleverness or ruse of the sender of junk mail and believing one is being offered something for nothing, one actually opens an envelope and examines its contents, both of which would otherwise been deposited unopened in their rightful place, the garbage can. Snake oil salesmen have been replaced by bulk rate advertisers whose wares must be causing our postal carriers' backs to be nearing the breaking point under the weight of such mail.[517]

Everyone living in a contemporary capitalistic society can recognize very well the scenario depicted above. As a matter of fact, we are bombarded with firm offers, gratuitous promises and interested promises alike not only through our mailbox, but also by radio, T.V., email and mobile phones. This everyday fact is solid proof of the fact that companies garner an advantage by making interested promises. But it also shows the reverse of their gain—we must tolerate their inducing us to engage into their businesses. We, without deciding it, create the chances they are looking for. This is an issue of life in contemporary civil society, which deserves juridical evaluation.

My scholarship offered a transactional explanation of interested promises. The promisor disposes a performance of hers, the promisee receives that performance, the reception of that performance induces him to produce a chance and, as the chance is the benefit sought by the promisor, the promisor enjoys that benefit. But Part 5 assumed that it is "okay" to

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for breach of contract. Time argued that there was no contract because the mere act of opening the envelope was valueless and therefore did not constitute consideration. The court nevertheless held that:

> The act at issue here—the opening of the envelope, with consequent exposure to Time's sales pitch—may have been relatively insignificant to the plaintiffs, but it was of great value to Time. At a time when our homes are bombarded daily by direct mail advertisements and solicitations, the name of the game for the advertiser or solicitor is to get the recipient to open the envelope [....] From Time's perspective, the opening of the envelope was "valuable consideration" in every sense of that phrase.

As the commentator puts it "The court rejected this argument on the ground that Time had bargained for and received the chance that if Joshua opened the envelope, he would order Fortune". Melvin A Eisenberg, "Probability and Chance in Contract Law," in UCLA L. Rev., 45, (1997-1998), pp. 1005-1076 at 1018 (italics omitted). The court nevertheless dismissed Joshua's suit on another ground—that Joshua could not maintain the suit as a class action, and his individual claim was barred by the de minimis principle.

[517] Opinion by King, J., with Low, P. J., and Haning, J., concurring in Harris v. Time, Inc. (1987) 191 Cal. App. 3d 449 [237 Cal. Rptr. 584].

cast the promisee as someone who is creating a right for the promisor. It assumed that the chance-creating act is an interaction whereby the owner of a thing (the bargaining mode of reasoning) creates a benefit for another person (the value of the chance), which benefit the promisor takes as her own thing (has the right to benefit from the chance).

I could have offered other legal explanations. Joining the judges of the quoted opinion, I could have left the matter to classical private law. This is to say, conceived of the promise as an offer and, as there was neither acceptance nor consideration, dismissed the promisee's demands for lack of a legal case. This would mean that private law simply permits the practice of making interested promises. The promise of one party amounts to a contract proposal (or junk email) and the expectations of the other party to a self-made (or illegitimate) expectation (or the act of someone who has been fooled, as one of the justices in *Harris v. Time, Inc.* puts it).

Another possibility would be to prohibit the practice of making interested promises. The law could elaborate a norm saying something like "whoever makes an interested promise is liable for X fine," "or goes to jail."

If we neither prohibit nor simply permit the practice we could, as a third alternative, regulate the practice in some form. "It is okay that people make these promises. We will not prohibit them, but we will not leave promisors to revoke their promises at will." There are three natural courses of action. First, we could prescribe a tort remedy for the case of promise non-performance. Second, in an attempt to add some punitive spice, establish a punitive damage remedy. The last possible kind of regulation is the proposal of this PhD, which is to regulate interested promises as what they are—voluntary causes of obligations.

This section seeks to evaluate the alternative explanations. The result will reinforce the conclusions of my investigation. The claim is that treating the interested promise as unilateral (enforceable) promises is the best possible private law rule.

6.2.2. Possible legal responses

Private law should render interested promises enforceable by considering that the reception of the promise by the promisee induces him to cause the benefit the promisor sought when making the promise, and obtained with the promise. In other words, this has been the argument of Part 5. This section is dedicated to evaluating the alternative proposals, which are:

First, the law should avert her eyes from the practice of making interested promises, or simply permit it.

Second, the law should prohibit the practice of making interested promises.

Third, the law should regulate the practice of making interested promises as a tort or as a cause of punitive damages.

6.2.2.1. SHOULD THE LAW SIMPLY PERMIT THE PRACTICE OF MAKING INTERESTED PROMISES?

What do I mean by *simply permitting* the practice of making interested promises? A conduct that is simply permitted by the law is a conduct whose social effects are irrelevant to the law. For example, Ann is Paul's girlfriend. Ann cheats on Paul with his best friend. Paul gets upset and suffers. Has Paul a compensation claim? The answer of all private law would be: "No, he has no claim. Even if our morality condemns Ann's deeds and Paul's grief could be translated into money, Ann's deed is not a legal wrong, for Ann is (legally) free to have sex with others outside marriage." Another example: Françoise owes ₹1.000 to Pier. The cause of the debt was a gambling contract. They made the contract and played the game in a private address. Pier claims his credit to Françoise at a court of justice. The judge, who judges in accordance with the 1804 *Code Civil*, dismisses the demand. The argument is this: Even if private gambling is tolerated (simply permitted) by the French Republic, the debts arising out of it cannot be claimed at a court, for the "reason" of these contracts goes against the morality of the Civil Code.[518]

Simply permitting the practice of making interested promises signifies that private law is and must be indifferent to whatever effect (chance-creation, expectations or reliance) the making of an interested promise may bring about.

I want to argue that this thesis gives rise to injustice.

True, the classical rule is very clear in that the proponents can revoke their proposals before acceptance. Hence, the promisee should know that involvement and investment in an interested promise is undertaken at his peril. Yet, the practice of making interested promises has gained currency in contemporary civil societies. The reasonable man seems to take "firm promises" not as revocable offers but as what they are, firm promises. That promisees have the certainty that the promise will stand seems to be confirmed by the fact that promisors make these promises. For the benefit that promisors get—the chance that a promisee does something they want—depends on the fact that promisees believe that the promise stands firmly.

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[518] This is the doctrine of Book III, Title XII, Chapter 1, Articles 1965-1967.

Jenny Holzer, From
http://www.autostraddle.com/
artist-attack-jenny-holzer-cant-
protect-you-anymore-133945
(Caselli's selection)

So the social effect of the interested promises is twofold: on the one hand, promisees have the assurance that the promise stands, and on the other hand, promisors obtain a chance that promisees do what they want.

It is almost redundant to say that the cause of the latter social effect is the former. Promisors obtain the sought-for chance because promisees trust and have the assurance that the promise stands. So, if we were to ask, what is it that the promisor pays for having her "social effect?" We would respond: She pays what the promisee obtains, the assurance that a promise stands firmly, the "other social effect." What the promisor pays for her sought-for chance is what private law calls voluntary obligation. But if we were to ask, what is it that the *promisee* pays? If the cost of the promisor's chance is the obligation to maintain the promise, then, what is the cost of the promisee's assurance? And I would say that the cost for the promisee is twofold. First of all, the promisee has to *tolerate* an unrequested benefit. To express it vividly, she has to deal with the thrice-weekly fact of having to empty her mailbox of the several (maybe uninteresting) interested promises. Secondly, the promisee has to *take notice* of unrequested promises. Since the promisee is a diligent private law person, she must cultivate awareness of her daily mail, get to know what the promisor says to her, and thus receive the assurance.[519] In sum, the promisee gains a possibly useful assurance but loses by having to tolerate and be aware of an unrequested promise.

Now I can make my point. If private law simply permits the practice of making interested promises (as it does in its classical version), private law leaves space for the following injustice:

The promisor *obtains* the chance and, having had the promisee tolerate and consider the unrequested promise, the promisor repents of having made the promise and uses her power of revocation. Again, this abuse is possible because the reasonable person takes "firm promises" as firm promises but the law takes "firm promises" as revocable offers. As a result, the promisor gained the benefit of the chance without suffering the obligation. Or, what is the same, the promisee had to tolerate and consider the unrequested proposal without gaining the right. This does not seem to be a simply licit interaction (See 4.1.3.3.1).

[519] See 5.4.2.1.

Hence, simply permitting the practice of making interested promises leaves room for injustice.

6.2.2.2. WOULD THE LAW BETTER PROHIBIT THE PRACTICE OF MAKING INTERESTED PROMISES?

Simply permitting the practice of making interested promises creates the risk of an abuse. The law could avoid this risk by condemning the practice. This is to say, the law should criminalize the practice of making interested promises in order to deter promisors from deceiving consumers, contractors and persons in general. The law could say for example, "Whoever makes a promise intending to induce the promisee to do something she wants must pay a fine of $X." From now on persons are no longer able to get benefits through promises, for the law detected that with a promise, a person can get a benefit and avoid the benefit's costs.

Let me evaluate the prohibition hypothesis:

It is difficult to argue that the making of a promise is something intrinsically bad. The reason for which a law would prohibit this practice is the misuse of the institution of promise by badly intentioned persons. But the risk inherent in the institution of promise is comparable to the risk that comes with freedom itself.

One could believe that murders occur due to the excessive exposure of persons. As persons have the freedom to meet in public places, freedom sets the stage for murders. We would be better banning public interactions. We will enact a law by which persons who go around public places will be liable for a public fine. Interactions will reach their minimal possible number and murders will be reduced. The absurdity is evident.

A comparable absurdity would be reached by the act of prohibiting interested promises.

6.2.2.3. SHOULD LAW REGULATE THEM AS PRIVATE LAW TORTS?

Prohibiting the practice of making promises is an absurd thing to do. The law could, instead of prohibiting the practice of making interested promises, prohibit the practice of breaching interested promises. This seems reasonable. The crucial questions are these: Why are we to do that and what should be the measures taken in the event of a breach?

The reason private law could prohibit the breach of a promise is that the promisee became the owner of the promised thing. From the moment he receives the promise, the promise becomes a thing of his own, like his body, house and other belongings. He has a right over the thing promised as he has a right over his things. If the promisor breaches the promise,

the promisor is harming something of the promisee. So the promisor must repair the damaged thing. If this is how we explain why breaching a promise is wrong then we are making a juridical, private law-like explanation. It is wrong that the promisor breaches the promise because it harms something of the promisee. But then the question arises: What should be the measure for the damage? Having given the juridical explanation we cannot say: "The remedy should consist of all the expenditures that the promisee expended while relying on the promise, like his money, things and time." Why can't we? Well, because in this case, the obligation would be correcting harm made not to the promised thing itself, which is the thing that the promisee acquired through the promise, but to other things of the promisee, namely her money, her things and her disposable freedom. If we want to protect the promise as an acquired interest or right, then we have to say that the breach of promise obligates the breaching person to perform the promise's content, namely to do what she must do so that the promisee has the promised performance performed or the monetary substitute. If we want to make the promisor liable for the promisee's expenditures in reliance on the breached promise, we have to explain why those expenditures were due to the misconduct of the promisor. We cannot say that the misconduct consisted in the breach of the promise, for as the protected interest is not the promise (but the things the promisee expended), the breach of the promise is not the illicit act. Unless we determine the causal connection between expenditures of the promisee and the wrong of the promisor, the disposition that the promisee made with his resources was not due to the materialization of an illicit act in private law perpetuated by the promisor—it was his own responsibility.

(A) A CASE FOR PUNITIVE DAMAGES?

The criticism made of the tort solution obviously applies to the punitive damages approach. Still, we can say some things about punitive damages specifically. Private law could, for example, establish that the non-performance of an interested promise renders the promisor liable for damages that equal the amount of money that she saved by breaching the promise. So, if a TV company preferred not to perform the promise to give the job of anchorman to the winner of a competition because it calculated that the coming TV show will be more successful if it is presented by a third well-known journalist, then the company must be liable to pay all the money it calculated the TV show will gain by employing the third party presenter to the promisee-winner of the challenge.

Actors, consumers and people in general will feel satisfied by such a measure. I myself would feel so too. The ways in which companies utilize the private law to play with the expectations created by consumers cannot fail to astonish. But punitive damage is not a private law solution. If you give such an amount to the promisee of our example you are

enriching him without a cause. What did the promisee do to accrue such an amount? The thing he lost after all was the opportunity to act in a TV show and perhaps achieve fame. But he did not lose the 25 million dollars the clever lawyer argued for in the case in my example. One could prevent the unjust enrichment by saying that the promisor must compensate the plaintiff to the measure of his impoverishment and pay the punitive damages to a union or association representative of the interests of the plaintiff qua class. In the example, part of the money would go to the winner of the competition and the larger amount to the association of performers. Cabral, Mariano, López Andina and I elaborated this proposal in an essay addressed to Argentinian jurists.[520] Yet, having considered it again, I must say that from the private law perspective, the proposal is inadequate. What explains the participation of the association? What did the defendant do to the association to grant it a right as against the defendant? One could venture explanations, certainly, but without these explanations one cannot see the connection between the association and the defendant, and therefore one cannot justify the claim of the association as against the defendant.

6.2.3. Private law can give to interested promises their due

6.2.3.1. A restatement

Ordering the interested promise as a voluntary transaction is the only reasonable solution. What is more, one has reasons to believe that that is the right or adequate approach. Indeed, Part 1 showed that the interested promises provide promisors with a benefit and that such benefit cannot but come from the promisees. In other words, we noticed that the interested promises *themselves* manifest a sort of commutation. Based on this reading, Part 5 dedicated itself to looking for a form of saying what was already implicit in the reality we called interested promises. True, the idea that the promisee possesses a bargaining mode of reasoning, that the reception of the promise induces him to put that reasoning into action, that such act produces a chance and that the promisor perceives the value of the chance as someone who acquires a right over the benefits of the thing of another, are perhaps strange and complicated ideas. It is merely a proposal. I will use this space to present my apologies to the reader for any lack of clarity during our exploration, and to open the floor to simpler ideas.

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[520] Facundo Cabral, Habib, Javier, López Andina, Daniela and Mariano, José, "Hacia una reparación del daño ambiental", essay prized in the student essay competition "Guillermo Borda" of the XXI Jornadas Nacionales de Derecho Civil, Universidad de Lomas de Zamora, Buenos Aires, September 2007, arguing that punitive damages could be an effective tool for environmental damage prevention. Available in https://www.academia.edu/550664/Hacia_una_reparación_del_daño_ambiental (10-07-2015)

6.2.3.2. An offhand proposal against the abuse of freedom to contract

I want to finish this investigation by suggesting a solution to the issue of unrequested unilateral promises. Responding to the first undesired unilateral promise received by A from B, A can communicate to B that he is not interested in receiving B's promises. In the event that B sends another promise to A, B is straying beyond her freedom to contract. What remedy should be implemented? I leave the reader with this thought. But let me add this:

In a state private law, the solution could be systematized. I assume that there is an institution—like a register of persons—from which companies take the names and domicile of the persons they address with their promises. A very practical solution would be this. The default rule is that every person is open to receiving and tolerating the unilateral promises that other persons send them. However, this is only a default rule. Persons could inform the institutions that provide names and domiciles to promisors that they are no longer interested in receiving promiscuous promises. So, with a personal and explicit request, persons could be excluded from the list of available promisees.

SUMMARY, CONCLUSION AND FINAL REMARKS

It is a fact that private law, that group of concepts and rules developed for the purpose of explaining and governing relations according to corrective justice, has suffered a crisis during the last century. New transactions appeared, and as private law tried to explain and govern them, its classical categories were deformed and its long-prized coherence was obscured. The method of jurists has largely been replaced by sociology and economics. But these alternatives put private law on a path to extinction. When it follows the methodology of sociology, private law finds that people want efficiency or some other value. But the idea of efficiency, or say, the value of the autonomy of the will, make private law issue regulations that cannot be explained in the context of its classical rules, concepts and institutions. My doctoral dissertation is an effort to support private law's continuance. It proposes a method for explaining and governing new transactions in accordance with classical private law.

These pages have been written to restate that the method works. Section 1 outlines the conclusions of Parts 2 and 3—namely, it explains how the application of the classical categories to a new type of case deformed the classical categories. Section 2 outlines the conclusions of parts 1, 4, 5 and 6—it demonstrates that the type of case that deformed private law during the last century can be explained and regulated in a way that looks and behaves like a classical private law category. Section 3 concludes this dissertation. It does so by suggesting that the incorporation of the new category will allow private law to reorganize itself and restore its classical categories to past health.

SCF.1. THE LAW ON PROMISES: AN EXAMPLE OF THE CRISIS

The revocation of unaccepted promises is an instance of a case that private law wanted to, but couldn't, effectively address with its classical categories. Some private law used the concept of contract to enforce revoked promises (that had never been accepted). English private law worked this way. To do so, common law had to treat promises as offers, and elaborate fictitious acceptances. The problem for contract law was that, as the fictitious acceptances were not fictitious acceptances of irrevocable promises, but rather of "offers," the fictitious acceptances became applicable to all sorts of offers, including true offers! The problem matures so that English contract law renders true offers of (generally unilateral) contracts enforceable before acceptance. Contract law is thus deformed—it is no longer about agreed-upon exchanges of rights.

At other times private law chose to grant promisees remedies to cure damages caused by the revocation of a promise. This solution caused problems, too, as can be seen in French

private law. Before the reliance arrangement, the Code Civil masterfully divided acts that cause obligation from acts of freedom. As the Code saw no cause or reason to bind the promisor to an unaccepted promise, promise in the Code Civil was a simply licit act, like an invitation to make a contract, go to the theater, or a love relation; things that people do without assuming legal obligations. To grant relief for the detriment caused by the revocation of a firm promise, French private law had to give some value to the expectations produced by promises. The question then arises, why is it that only reliance on a promise gives the right to a reliance remedy, and not reliance on a love declaration, a theater invitation, or a pre-contractual conversation? In French private law, it is no longer clear which act puts a person under an obligation, and which does not. The freedom/obligation division is blurred.

The third most popular legal response to the need for unaccepted promises to be enforceable has been the enactment of provisions that render promises enforceable *ex sempliciter.* Germany pioneered this solution, and the Principles of European Contract Law generalized it. According to section 657 of the German Civil Code, a person who performs an activity requested in a promise of reward is entitled to the reward, even if she performed the activity in ignorance of the promise. According to article 2:107 of the PECL, not only is the promise of a reward enforceable, but also "a promise," in general, every promise "which is intended to be legally binding without acceptance, is binding." The social demand is covered, especially with the latter norm—but at the expense of the coherence of the whole private law. Indeed, these norms stand in manifest incoherence with the idea of private law. Section 657 of the BGB shows ample disregard for the relational aspect of the causes of obligation. If the creditor of a contractual obligation has to know of and accept the credit to be able to demand expectation damages from the debtor, how can someone who never knew of the promised reward (who never engendered expectations) be entitled to demand expectation damages from the promisor? The PECL's article disregards the characteristic reciprocity of all causes of obligation. The problem now is that since these institutions cannot be explained in light of traditional private law characteristics, we need different explanations, like the doctrine of the autonomy of the will, or the popular ideas of efficiency. As we have seen, these explanations tend to overwhelm private law, and confuse its character.

SCF.2. CONTINUING PRIVATE LAW: A NEW CAUSE OF OBLIGATION

The method I have chosen to explain and regulate interested promises is neither that of the economists, nor of the moralists. The method I have sought to apply is, I believe, the traditional method of private law.

The first step consisted of looking at promissory cases predisposed to seeing traces of the juridical. The reality of promise-making is wide and varied, including episodes as diverse as promises to gods, lovers, family members, friends, relative strangers, and business people. Only the two latter contexts showed juridically interesting cases. The promise of a reward, contract, and fake gratuitous promises were the best examples. These promises are juridically interesting because, as I learned from sociological investigations, promisors make these promises to obtain what has been called "the value of a chance." Promisors assure promisees that they can count on the right to a reward, contract, or gift, because such assurances increase the likelihood that the promisees will do something the promisors want—like look for something they have lost, or decide to enter into a contract with them, or become consumers of their products.

The next step consisted of characterizing the unprecedented case. It is certainly unjust if a promisor makes this sort of promise to the promisee, the promisee creates the value sought by the promisor, but the promisor then revokes the promise without liability as against the promisee. If this is a licit scenario, then the promisor has acquired the chance without paying its cost—the assurance to the promisee that he can count on the promise. On the other hand, the promisee received a promise that he never requested, created the possibility of acting as the promisor wanted, and then finds out that the promise was a mere declaration of intention. It is clear to me that the legal concept for promise is like those that private law uses to correct injustice. The task for me, accordingly, consisted of writing about juridically interesting promises in such a way that the reader could read a new cause for private law liability, a concept structured like the contract, tort, and unjust enrichment, and presented with names that make it sound legal.

Thus, I applied myself to juridical construction—to determine promise as a new cause of obligation. As all causes of obligations, the "unilateral promise" presupposes two persons owning things: the promisor, who owns a right over freedom to dispose and the promisee, who has a right over a bargaining mode of reasoning. As the voluntary cases of obligation, the unilateral promise is an interaction where two parties exchange their things: The promisor promises a (piece of freedom or) performance that the promisee receives as a credit right, and the promisee puts his reasoning into action, producing the chance that the promisor wants. The promisor perceives the benefit of this chance as someone who acquires a right over the fruits of the thing of another. The unilateral promise perfects an exchange of a "promissory right" for "a right over the benefit of a chance."

If the systematic concept of contract is composed of the sub-concepts of "offer," "acceptance" and "consideration;" and the concept of tort is composed of the sub-concepts of "wrong," "damage," "cause" and "liability;" and the concept of unjust enrichment of

"enrichment," "impoverishment," and "lack of cause," what are the components of the new systematic concept? I elaborated unilateral promise as a concept composed of "promise," "reception," "chance causation," and "chance perception." An exchange of a promissory obligation for a chance takes place when the promisor makes a *promise*, the promisee *receives* the promise, the reception of the promise induces the promisee to *cause a chance* and the promisor *perceives the benefit* of the chance. Part 5 concluded by showing that the unilateral promise does not occupy the field of application of the other causes of the obligation.

Two sensitive questions arise. First, why should the promisee tolerate another granting him a right that he neither requested nor accepted? The answer to this question lies in "freedom to contract obligations." The promisee, as the promisor, owes every possible promisor the non-right to oppose against pacific interventions like offers, promises, and other conferral acts. Critics, if they wish to avoid neglecting the legal possibility not only of promise, but also of contract, must accept that by this freedom or privilege, persons can impose entitlements on non-accepting parties. Okay, but how can it be right that an interested promisor not only imposes a right on someone who neither requests nor accepts it, but also acquires something from him, the alleged value of a chance? This is a truly sensitive question. My proposal is that, given the absurdity (it is a crime to make interested promises) or impropriety (punitive damages) of alternative regulations, the concept of unilateral promise emerges as the best possible solution. To prevent abuses of the freedom to contract obligations, I propose that institutionalized private law could establish a register where every person who did not want to receive promiscuous offers and promises could put her name. Before making their public offers or promises, companies would have to check that they were not addressing someone who did not want to be addressed.

SCF.3. THE UNILATERAL PROMISE: SOME PROBLEMS SOLVED

National private laws have tried to fill the need of a legal solution to promissory cases with problematic arrangements. Part 2 showed how the figure of the collateral contract, the reliance theory and the doctrine of the *obligationes ex lege* have corrupted juridical interpretations of, respectively, English contract law, the French law of obligations and German private law. The unilateral promise not only promises to tackle the legally interesting promises without occupying the field of application of the classical categories but also to act as a purge of deforming arrangements. This is to say, if the state private laws incorporate the concept of unilateral promise, they will have means to deal with interested promises without having to use the double contract analysis, the reliance theory and the *obligationes ex lege*. As the problematic arrangements lose their practical

sense, they will become automatically abrogated. The classical private law concepts and divisions will recover their healthy form.

Let me conclude in a technical fashion. Given that, as shown in 2.2.1, courts have implied acceptances and illusory promises in order to enforce interested promises as contracts, and that, as explained in 2.2.3, these arrangements deform contract law, and that, as proven in parts 4, 5 and 6, it is possible to construe interested promises as a *sui generis* voluntary cause of obligation, then it follows as a corollary that instituting unilateral promises in private law would heal contract law; for (and this is mere redundancy) instituting unilateral promise in private law will render some of the inimical contract law fictions futile, automatically abrogating them.

Furthermore, given that, as shown in 2.3.1, courts apply reliance theory to give promisees remedies to cure damages caused by the undue revocation of promises, and as explained in 2.3.3, reliance arrangements blur the just division between acts of freedom and causes of obligation, and as proven in part 5, unilateral promise serves to enforce promises that bring benefit to the promisors and only those promises, then it follows as a corollary that the private law that institutes unilateral promise will reemphasize the blurred division between freedom and obligation; for (and this is mere redundancy) unilateral promise will serve to govern many of the cases that today are governed by reliance arrangements.

Finally, given that, as shown in 2.4.1, parliaments enact norms by which simple offers and unnoticed promises create voluntary obligation, and, as explained in 2.4.3, these dicta and the considerations supporting them enter the legal system to confuse the form of private law, and, as seen in part 5, unilateral promise orders promises in accordance with corrective justice, then it follows as a corollary that a private law that recognizes unilateral promise will accentuate the form of private law; for (this is mere redundancy) a new juridical category will shine along with contract, tort, and unjust enrichment, and various spurious dicta and considerations will become otiose and henceforth automatically abrogated.

In short, instituting the unilateral promise in a corrupted private law produces an automatic reorganization, by which each of the system's components reacquires its just and healthy form. Private law hence purges many of its deforming decisions.

SCF.4. Final remarks: Topics of interest for the 21th century jurist

My PhD applied to promises a method which I think could be applied to all cases that private law governs to its own detriment. I want to finish this work by suggesting three possible topics of interest for the 21th century jurist.

S.C.F.4.1. OVERGROWN PERSONALITIES

Inequality is not only an issue of public concern, but also the source of many private law issues. Laws imposing uses on property and limitations to freedom of contract have arguably been issued to palliate some of the sad effects of inequality. These laws go to the heart of private law. Dominum is no longer the right by which a person puts a thing to the use she best likes, and contract no longer the instrument that persons articulate to exchange things in the way they best want; hence, the crisis of property and contract law. Has the methodology of private law something to say to these issues?

There are some things that private law simply cannot say. Private law cannot say that whoever owns Y sort of thing and does not use it in X sort of way will have to use it in X sort of way. Neither can private law say, if there is one person with seven and six persons with zero, the person with seven will have to give one to each of the six who have zero. No! Private law is not about distributive justice, it cannot be about distributing uses to things, or things to persons. Private law is about equal freedom. The private law solution to the problem of inequality lies in something that private laws have forgotten to do: regulating the authorization by which persons can obligate others to stay away from the things they appropriate, and the freedom that persons dispose as future assets through contracts and promises.

I will make three brief notes. First, I will argue that private law cannot but regulate the authorization to acquire property, and the right over disposable freedom. Second, I will offer a suggestion on how private law could regulate the authorization to acquire property.[521] Finally I will offer a prognosis: In implementing this necessary regulation, private law would solve the issue of inequality while purging many of its corrupting laws.

In law, everything begins with an entitlement, be it given by another in reciprocation (as we private lawyers like to say),[522] or by an authority in attribution (as a public lawyer would argue).[523] Romans liked to say, "to each his own." If everything begins with something of your own, then your capacity to acquire property, and your capacity to dispose your future performances through contracts, must be your own, too. Yet, something of your own must be in some way determinable. You cannot have some diffuse thing as your own. Hence, the saying "persons can extend themselves unlimitedly" cannot be a saying in law. For no legal authorization can be devoid of limits. Neither can law take

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[521] I have written about the right over our disposable freedom in 4.1.3.2 (a), 4.1.4.3, 5.2.1.2 and 5.2.2.1.

[522] See Introductory Part.1.1.

[523] See 6.1.2.

as proper the saying of the merchants, that "what matters is not what one has, but what others believe one has." Merchants can conceive of "credit" in such a way; but private law cannot. So, the extension that you can make yours by appropriation, and the freedom that you can exchange through contracts, must be limited, too. Otherwise, there are no things you could be authorized to acquire, nor could you have something to promise in exchange for other things.

There have always been things that persons cannot acquire. Recall the idea of *res sacrae*,[524] things whose spiritual value puts them outside of the commerce of men. Or even better, the idea of the *res communes omnia*,[525] those things so important for the life of all that they cannot be subject to the exclusive will of one. These laws regulate things—namely, classify a number of things as unsusceptible to ownership. The regulation that we must elaborate targets the authorization to acquire (acquirable) things. Private law has never done that. How can it be done? To start with, there is the universal authorization by which I have the capacity to make un-owned things mine. The exercise of this capacity grants me a real right over a thing, which you must recognize and respect. But the capacity itself has content. In other words, the un-owned things I can make mine are not unlimited. I imagine this content as a determinable extension that is freed to the person who has not occupied her own. This authorization is something like a negative right. Something that I own to the exclusion of others, a place that you cannot occupy without occupying what is freed for me. A place, I think, banned to those who have already occupied their own freed places.

Today, it seems to me that if we had to draw those regions, we would find ourselves wanting. For the few have already occupied places that should be freed for the many. In such a scenario, where someone has occupied the freed space of another there is an illicit act: someone (the overgrown personality) is beyond her right limits and in the freed space of another (call it, the slimmed person). If a slimned person were to come to an overgrown person and say, "Look, you are occupying too much, I still own space for extending myself and I want this space to be freed," one would not be demanding redistribution. I would not be demanding that you give to me from what is yours. I would just be saying, "Look, you have your feet on land that I should occupy. Please, leave this place. Not because your leaving will be followed by my arrival, but simply because you should not be standing there. What I do when you leave is for me to decide." The Internet could be the platform

[524] Justinian, Institutes, 2.1.7.

[525] Justinian, Institutes, 2.1.1.

where the measure of each one's own capacity of acquisition could be actualized, and the extension of each one's own freed spaces registered.[526]

What would the impact of such a regulation be? In the early twentieth century, laws were passed to demand that owners rent out their empty properties, or use their unused rural lands.[527] One could be tempted to propose similar laws today. But these laws deform private law. According to property law, I am the owner of my land in the sense that I am the only one enabled to decide what purpose it will serve. No one can tell me what to do with my apartment. If I want it to serve no purpose at all, that is my right. I cannot be obligated to rent it. But then problems emerge. The problems emerge (my intuition tells me) because of overgrown personalities. There are private law persons who need low-cost rentals because they have no home. And they have no home because overgrown personalities have more than ten. If the overgrown had to shrink her person to a size of entitlement that is comparable with that of the rest of her equals, then she, like all private law persons, will be able to do as she wishes with her two or three apartments.

The same can be said of rural properties. The need to demand the use of rural land, to tax revenues, and to regulate prices is due (I have the intuition) to the fact that some landowners own disproportionate tracts of land. If they owned smaller amounts, their deciding not to put their land to work for a season would not alter the life of the town's peasants, and their deciding to work it to its maximum capacity would not bring them revenues far greater than those of their fellow private law personas and, finally, their deciding not to sell or oversell would not by itself determine the price of a good. If each had a measure that was more or less comparable with what other private law persons *could* have, there would probably be no need of rural law, income taxes, or price regulation. Thus the law of property would readopt its original form; the right by which a person puts a thing to the use she best likes.

S.C.F.4.2. Intellectual things as res communes omnium

Sometimes law tries to give expression to class interests without success. Today we see desperate attempts to determine technical and scientific discoveries as objects

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[526] So if I discover a new continent, I extend each one's own capacity of acquisition. There is a new vast inhabited land; we are the same number of persons; our capacity of acquisition should be actualized. If before of the discovery I was a fit private law persona, someone who has acquired more or less all what he is allowed to, I will obviously have more space to extend myself. Yet again, I can occupy territory so long as my occupation does not prevent others from occupying their new freed spaces.

[527] See the theoretical foundations of such laws in the excellent works by Léon Duguit, *Les Transformations générales du droit privé depuis le Code Napoléon*, 2. éd., Alcan, Paris, 1920 and Karl Renner, *The institutions of private law and their social functions*, Agnes Schwarzschild, Routledge, London and Boston.

susceptible to ownership—so-called "intellectual property rights." But the reproducibility and volatility of these things make them inadequate for such technical determination. No matter how much you try, you will never make a table with water in its liquid state. These matters seem to resist the form law wants to impose on them. It is a case of what Radbruch calls "the determination of the form by the matter," where a matter appears to have only one possible legal solution.[528] The intellectual things seem to be more like *res communes omnium* in Grotius's sense—things whose nature makes them of communal use.[529]

S.C.F.4.3. NETWORKS

What about networks? The fact that I have entered into a relationship with you, relates me to parties with whom I have never related myself. Can we apply the rule of reciprocity to web relations? I have done something to your benefit. Because we belong to the same network, I acquire a credit and you acquire a debt. The credit I have acquired compensates for debts I might have acquired from others, and you will eventually have to extinguish your debt by benefiting me or another member of the network. If some members of the network grow unreasonably large, if two of us have far too many credits in comparison with the rest, what we have to do is seek proportionality, we need to benefit the impoverished members of the network. Again, the Internet could serve as the platform for regulating the balances.

The credits and debts one may have against other participants of the network cannot be regulated as credits and debts under the law of obligations for the reason that network debts are payable not only to the party that contributed to its cause, but also to every other member of the network. This does not mean that networks should be outside private law. As I have argued in 4.2, private law can open new branches.

S.C.F.4.4. LAST WORDS

"The class of jurists is in decline."[530] This is true, but there is a way to reverse that fall. My proposal is to continue private law, to correct past mistakes with adequate private law,

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[528] I take the expression from the great Gustav Radbruch, Filosofía del Derecho, 3ª ed., José Medina Echeverría translation, Reus, Madrid, ¿2007?, pp. 48-49 and 261, where he relates the idea to Eugen Huber.

[529] The use by Grotius of the idea of *res communes Omnia* (in Hugo Grotius, *The Freedom of the Seas*, translated by Ralph Van Deman Magoffin, New York: Oxford University Press, 1916, Chapter 5) is different from the use made by Tribonian et al. (Justinian, *Institutes*, 2.1.1.)

[530] "Il ceto dei giuristi è in decline; e la giurisprudenza, classicamente intesa quale scienza giuridica (iuris civilis scientia), ha perso il suo tradizionale ruolo primario in tutto il percorso, intellettuale e operativo,

and to extend private law over new, unexplored realities. There is plenty of work to do, and I see this vacuum as an opportunity. We have the opportunity to exploit thoroughly virgin fields with extremely powerful and suggestive know-how. We must make just private law.[531] This is the time to do it. This is especially so since the last living private law is still visible. Many lawyers still believe that contract is a commutation of subjective rights, that tort obligations are for correcting wrongful harm, that persons cannot enrich themselves at another's expense, that persons are equally free beings, not things susceptible to exploitation. It will be much more difficult to convince a generation raised and educated in a society where the right signifies wealth-maximizing behavior of the value of the practice I have tried to demonstrate in this work. We still live in an age where arguments based on equality still have an appeal. Hence, if I may paraphrase a private law modernizer, the vocation for our time is to make the voice of justice sound again. For what would a jurist say, if not what best accords with justice?

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che dalla creazione della regola generale e astratta conduce alla sentenza decisoria del caso concreto." Vincenti, Umberto, *Diritto senza identità: La crisi delle categorie giuridiche tradizionali*, Laterza, Lecce, 2007, p. 153.

[531] There are contemporary examples of conceptual jurisprudence. See the inspiring article by George Gretton, "Ownership and its Objects: Back to the pandectists?," in *RabelsZ Bd.*, 71, (2007) pp. 802-851. What is more, academic journals have appeared to "far leva su detto patrimonio di dottrina e di pratica per mettere a fuoco i problemi epocali che sono venuti maturando nella società contemporanea e che hanno contribuito a modificare tradizionali concezioni del diritto, insieme con gli stessi fondamenti di questo. Riteniamo che sia giunto il momento di tentare una riorganizzazione di questo articolato insieme di conoscenze e di esperienze all'interno di un quadro teorico adeguato. Si tratta di un obiettivo certamente ambizioso, il cui conseguimento appare, comunque, lo strumento più idoneo per conservare alle facoltà giuridiche, e quindi alle Università, quel ruolo scientifico trainante di cui sono depositarie, evitando di cadere in un empirismo dominato da una pratica senza orizzonti." These are the opening words of the new series of *La rivista italiana per le scienze giuridiche*, Nuova Serie, I, (2010), p. VII.

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